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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 583

JOSEPH PATERNO, PETITIONER,

vs.

JOHN A. LYONS, AS COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED DECEMBER 12, 1947.

CERTIORARI GRANTED FEBRUARY 9, 1948.

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Notice of appeal to Appellate Division	1	1
Order appealed from	3	2
Memorandum opinion, Batt, J.	5	3
Notice of motion for prohibition order	18	11
Petition for prohibition order	20	12
Exhibit "A"—Judgment of conviction in County Court of Erie County	24	15
Exhibit "B"—Indictment in County Court	25	16
Exhibit "C"—Recommendation of the District Attorney of Erie County to the Court with respect to the plea referred to in Exhibit "A"	27	17
Answer to petition	28	17
Notice of motion to dismiss petition	31	19
Opinion, Ward, J., County Court	33	20
Stipulation waiving certification	48	30

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—5576

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Statement under Rule 234	49	30
Notice of appeal to the Court of Appeals	50	31
Order granting leave to the respondent-appellant to appeal to the Court of Appeals	52	32
Order appealed from—Appellate Division	53	33
Opinion for affirmance—Appellate Division	55	33
Stipulation waiving certification	65	39
Remittitur of Court of Appeals	66	40
Order on remittitur of Court of Appeals	68	42
Order granting leave to proceed *in forma pauperis*; granting certiorari and transferring case to Appellate Docket	70	43

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FOURTH DEPARTMENT

SUPREME COURT—ERIE COUNTY

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Corrections of the State of New York, Petitioner,

For an Order Directed to Honorable HAMILTON WARD, JR., as Judge of the County Court of Erie County, and Joseph Paterno, Respondents

NOTICE OF APPEAL

SIRS:

Please Take Notice that the respondent Joseph Paterno hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Special Term of the Supreme Court, Erie County, granted in the above entitled proceeding on the 29th day of July, 1946 and entered on the same day in the Erie County Clerk's Office, prohibiting the Honorable Hamilton Ward, Jr., as Judge of the County Court of the County of Erie from vacating the judgment of the Erie County Court entered the 16th day [fol. 2] of July, 1937, in an action entitled "People of the State of New York v. Joseph Paterno" and enjoining and restraining said respondent, the Honorable Hamilton Ward, Jr., from taking any of the affirmative steps proposed to be taken by him in accordance with his opinion dated March 20, 1946; and said respondent Joseph Paterno hereby appeals from the whole and each and every part of said order.

Dated: Buffalo, New York, July 31st, 1946.

Saft, Schweitzer & Sullivan, Attorneys for Respondent, Joseph Paterno, Office and P. O. Address, Suite 502-03, 17 Court St. Bldg., Buffalo, New York.

To: Nathaniel L. Goldstein, Attorney General, (Emil L. Cohen, Assistant Attorney General, of Counsel) for Petitioner.

Leo J. Hagerty, District Attorney of the County of Erie, Amicus Curiae (Maurice Frey, Assistant District Attorney, of counsel).

To: Samuel M. Fleischman, for Respondent, Hon. Hamilton Ward, Jr., as Erie County Judge.
Harry C. Vackel, Clerk of the County of Erie.

[fol. 3] At a Special Term of the Supreme Court held in and for the County of Erie in the County Hall in the City of Buffalo, N. Y. on the 1st day of July 1946.

Present: Honorable Paul J. Batt, Justice Presiding.

(Same Title)

ORDER APPEALED FROM

Upon reading and filing the notice of motion herein dated March 29, 1946, the petition of the Hon. John A. Lyons, verified the 29th day of March 1946, the opinion of the Hon. Hamilton Ward, Jr., dated March 20, 1946 and order of the Hon. Frank A. James dated April 9, 1946, notice of motion on behalf of the respondent Hamilton Ward Jr., dated April 4, 1946, the answer of the respondent Joseph Paterno verified the 5th day of April 1946, and after hearing Nathaniel L. Goldstein, Attorney-General of the State of New York, by Emil L. Cohen, Assistant Attorney-General, on behalf of the petitioner and Leo J. Hagerty of the County of Erie, by Maurice Frey, Assistant District Attorney, *amicus curiae*, in support of the application of the petitioner, and Samuel Fleischman, Esq., attorney for the respondent Hon. Hamilton Ward, Jr., as County Judge, and Saft, Schweitzer & Sullivan by Ralph Saft, Esq., attorneys for the respondent Joseph Paterno, in opposition to the application of the peti-ioner and due deliberation having been had, and upon my memorandum herein it is

Ordered that the application of the petitioner be and the same hereby is in all respects, granted, and it is further

[fol. 4] Ordered that the Hon. Hamilton Ward, Jr., as Judge of the County Court of Erie County be, and he hereby is, prohibited from vacating the judgment of the Erie County Court entered the 16th day of July, 1937 in an action entitled "People of the State of New York v. Joseph Paterno", and that said respondent be, and he hereby is, enjoined and restrained from taking any of the affirmative steps proposed to be taken by him in accordance with his

opinion dated March 20, 1946 herein and in the petition referred to.

Paul J. Batt, J. S. C.

Granted: July 29, 1946. R. E. Byron, Spec. Dep. Clerk. (Seal.)

Attorney Genl.—No Fee.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 5] In Supreme Court of New York, County of Erie

(Same Title)

Nathaniel L. Goldstein, Attorney General (Emil L. Cohen, Assistant Attorney General, of Counsel) for Petitioner.

Leo J. Hagerty, District Attorney of the County of Erie, *Amicus Curiae* (Maurice Frey, Assistant District Attorney, of Counsel).

Samuel M. Fleischman for Respondent, Hon. Hamilton Ward, Jr., as Erie County Judge.

Saft, Schweitzer & Sullivan (Ralph Saft, of Counsel) for Respondent, Joseph Paterno.

Memorandum

Batt, J.:

This is a proceeding brought under Article 78 of the Civil Practice Act by the Commissioner of Correction of the State of New York, John A. Lyons, for an order directed to the Honorable Hamilton Ward, Jr., as Judge of the County Court of Erie County, to prohibit him from vacating a judgment of the Erie County Court against the respondent, [fol. 6] Joseph Paterno. The respondent Judge of the Erie County Court has moved to dismiss the petition as a matter of law, upon the ground that it does not state facts sufficient to constitute grounds for the relief sought, and the respondent, Joseph Paterno, has interposed an answer to the petition which does now dispute the facts of the case.

Joseph Paterno was indicted by the Grand Jury of Erie County on October 30, 1936 for the crime of criminally receiving stolen property. On November 10, 1936, he was arraigned and pleaded not guilty in the presence of his

counsel. On April 14, 1937 the respondent Paterno again appeared in Court, withdrew his former plea of not guilty and pleaded guilty to attempted grand larceny, second degree. The plea was accepted by the Court after the District Attorney recommended "that the defendant be permitted to plead guilty to the reduced charge of attempted grand larceny, second degree." On July 16, 1937 the respondent Paterno was sentenced to a term of 1 year and 3 months to 2 years and 6 months, execution of which sentence was suspended and respondent Paterno was placed on probation to make restitution of $75.00.

Subsequently, on November 17, 1941, the respondent Paterno was sentenced to Attica Prison by the Chautauqua County Court upon his plea of guilty to the crime of robbery, second degree, to a term of not less than 15 years nor more than 30 years as a second offender. The 1937 conviction of the respondent Paterno in the Erie County Court [fol. 7] was used as a basis for making him a second offender. The respondent Paterno is still serving the Chautauqua County Court sentence in Attica Prison, which sentence by its terms has not expired.

Prior hereto the respondent Paterno commenced a habeas corpus proceeding in the Wyoming County Court, contending that his Chautauqua County sentence was irregular, in that his prior conviction in the Erie County Court was illegal. The claimed ground of illegality was the same ground which is now urged in this Court, to-wit; that the Erie County Court improperly accepted a reduced plea of grand larceny, second degree, under an indictment for criminally receiving stolen property. The Wyoming County Court upheld the contention of the respondent Paterno and remanded him to Chautauqua County Court for resentence. An appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, from the order of the Wyoming County Court. The Appellate Division reversed the Wyoming County Court order and directed that the respondent Paterno be remanded to Attica Prison under the Chautauqua County Court Sentence. The decision of the Appelate Division was based upon the Court of Appeals decision in the case of People *ex rel.* Wachowicz v. Martin, 293 N. Y. 361, which had been decided in the interim.

The respondent Paterno is now making a motion in the Erie County Court to vacate the judgment entered upon his plea of guilty in 1937, upon the same ground heretofore

[fol. 8] urged, to wit: that the Erie County Court improperly accepted the reduced plea of grand larceny, second degree, under an indictment for criminally receiving stolen property. The respondent Erie County Judge Hamilton Ward, Jr., has indicated in an opinion dated March 20, 1946, that he was about to grant the motion of the respondent Paterno, but suggested that this proceeding be brought to test the question of whether or not he had jurisdiction to grant the motion. Accordingly, this proceeding has been brought, in the nature of prohibition, to enjoin the Erie County Judge from proceeding with any of the steps proposed to be taken by him, as indicated in his opinion of March 20, 1946.

A temporary restraining order has been made herein pending the determination of this proceeding.

The facts in this case are identical with those in Wachowicz v. Martin, 293 N. Y. 361. In that case as in this, the defendant claimed that the judgment of conviction was in violation of Article 1, § 6 of the Constitution, providing "no person shall be held to answer for a capital or otherwise infamous crime unless on indictment of a grand jury." The Court of Appeals dismissed a writ of habeas corpus in the Wachowicz case.

The respondent in this case prays the Court to vacate and set aside the judgment of conviction under the inherent power of the Court to correct its own judgment under the authority of Lyons v. Goldstein, 290 N. Y. 19. In that case the Court held the judgment was a nullity. In the Wacho- [fol. 9] wicz case the Court of Appeals held that the judgment of conviction was not a nullity, but merely erroneous. The Court stated at page 365 as follows:

> "Though the judgment of conviction of the charge of attempted grand larceny is erroneous, the question remains whether it is a nullity and whether a person held thereunder may challenge the lawfulness of his detention by writ of habeas corpus. That question was not presented in People v. Miles (289 N. Y. 360) for there the judgment finding the defendant guilty was challenged and was reversed on appeal from the judgment. In People *ex rel.* Battista v. Christian (249 N. Y. 314) no criminal prosecution had been commenced by presentment or indictment of the Grand Jury and the court for that reason was forbidden by the Constitution to hold the relator to answer for *any* infamous

crime and had no jurisdiction to pronounce judgment finding the relator guilty of any such crime. The judgment in that case was not based upon an erroneous judicial ruling in a pending judicial proceeding. It was based upon a ruling of a judge before whom no judicial proceeding was pending. Such a judgment is, of course, a nullity, and a person restrained thereunder is entitled to discharge upon the hearing of a writ of habeas corpus. Here the judgment is based upon a ruling by the court in a judicial proceeding which had been commenced by an indictment of the Grand Jury and which was pending in the County Court of Erie [fol. 10] County when judgment was entered. The County Court of Erie County which pronounced sentence has general jurisdiction both of the crime charged in the indictment and of the crime of which the relator has been found guilty, and had jurisdiction of the person of the relator when he was arraigned upon that indictment and pleaded not guilty to the indictment, and when the relator withdrew that plea and offered to plead guilty to attempted grand larceny second degree under the second count of the indictment. * * * Error there may be corrected by appeal, but the judgment entered upon an erroneous determination of a question of law by a court of competent jurisdiction is not a nullity, and may not be challenged by a writ of habeas corpus."

Under an identical state of facts as existed in the Wachowicz case, the respondent in this case, acknowledging that his conviction may not be challenged by a writ of habeas corpus has applied to the County Court of Erie County to exercise its inherent power to vacate the first judgment of conviction against him.

The question presented upon this motion is: Has the County Court of Erie County jurisdiction under its inherent power, to correct a judgment which is not a nullity but is merely erroneous?

Prior to the Goldstein case, the Court of Appeals had not passed directly upon the question whether the court of original jurisdiction had inherent power to correct mistakes or errors in its judgments in criminal cases, upon a motion [fol. 11] to vacate same. In that case the Court of Appeals stated at page 25:

"The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted (Furman v. Furman, 153 N. Y. 309; Matter of Holden, 271 N. Y. 212). No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis*."

In what cases under the common law was a writ of error *coram nobis* granted?

"A writ of error *coram nobis* is an ancient, almost obsolete common-law writ used to obtain the review of correction, *on account of some error of fact*, (emphasis ours) of a judgment entered by the court awarding the writ, the entire proceeding although applicable to criminal cases, being in the nature of a new civil suit."

It was devised "to bring before a court a judgment previously rendered by it for the purpose of review or modification, *on account of some error of fact* (emphasis ours) and not of law affecting the validity and regularity of the [fol. 12] proceedings, and which was not brought into issue at the trial thereof. At common law it performed omnibus functions to call attention to a trial court of its errors and to give such court an opportunity to correct them. The purpose of the proceeding is to have the judgment declared void and vacated, or to obtain other relief therefrom by showing error of fact." • • •

"The writ differs from an ordinary writ of error in that it does not remove the case to a higher court for review and that it lies only for errors of fact not apparent of record instead of only for errors of law apparent of record."

It lay "to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of accused, and without negligence on his part, he has been

deprived of a defense which he could have used at the trial, or where facts have been concealed at the trial, which if known would have prevented a conviction."

It did not lie "where there is another remedy, or by motion for a new trial, or in arrest of judgment, appeal."

26 *Corpus Juris Secundum*, § 1606, pp. 143-147.

As Justice Hughes stated in United States v. Mayer, 235 U. S. at page 69 in connection with the jurisdiction to grant a writ of error *coram nobis*, "This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, [fol. 13] in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." See also Camp v. Bennett, 16 Wend. p. 51.

That only errors of fact may be considered upon a motion to vacate a judgment is indicated in Matter of Morhous v. N. Y. Supreme Court, 293 N. Y. at page 140:

> "Controverted questions of fact whether the relator is deprived of his liberty without due process can be determined by a motion to vacate the judgment made in the court which granted it."

To the same effect is Hogan v. Supreme Court reported in New York Law Journal Feb. 7, 1946 in which Judge Desmond says:

> "One of the incidental powers which every competent court needs, and must have, to carry out effectually its specific statutory powers, is the power to strike from its records judgments which are void for fraud, not merely erroneous in law."

The same reasoning appears by inference in People v. Gersewitz, 294 N. Y. 163 which was an appeal from an order denying a motion to vacate a judgment of conviction. The Court stated (page 167):

> "The court has nonetheless recognized, at the same time, that courts have always asserted and exercised authority which, though perhaps not expressly established by statute, is based upon the inherent right [fol. 14] and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent op-

pression or persecution. 'It is a power,' the court said, 'which the legislature can neither curtail nor abolish, and to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional' * * *. We have sanctioned the exercise of such a power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional right of a party. *Perhaps that power can have no broader scope.*" (Emphasis ours.)

The record before the County Court now is the same record that was before it at the time of respondent's first conviction. There is no necessity for its correction. The only error claimed is one of law in that the court, the district attorney and the respondent assumed that the crime of attempted grand larceny was a lesser degree of criminally receiving stolen property. There was no error of fact which would justify a writ of error *coram nobis* or a motion to vacate the judgment. In the Goldstein case there was fraud which did not appear upon the record. In the Gersewitz case there was a claim that the defendant had not been appraised of his right to have counsel. The Hogan case was one in which fraud was involved.

Subject only then to the inherent power of the court to correct its judgments or to vacate them for error in fact [fol. 15] such as fraud, the practice in criminal cases is governed by the Code of Criminal Procedure (People v. Gersewitz, *supra*).

§515 of the Code of Criminal Procedure provided:

"* * * hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding, or special proceeding of a criminal nature, is by appeal.

§331: "* * * the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial under the plea of not guilty, and in arrest of judgment."

§467: "A motion in arrest of judgment is an application on the part of the defendant, that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant upon the plea of a former

conviction or acquittal. It may be founded on any of the defects in the indictment mentioned in section 331."

In the Wachowicz case, the Court of Appeals decided that under the circumstances involved in this case, there was no violation of the constitutional provision requiring an indictment and that the plea of the respondent in this case compares with a situation where the facts stated in the indictment do not constitute a crime.

It is claimed that respondent was convicted without due process of law. There was no violation of the "due process" clause in this case, the respondent could have moved in arrest of judgment after his plea of guilty on the ground [fol. 16] that the facts stated in the indictment did not constitute a crime.

In the absence of a motion to dismiss the indictment or in arrest of judgment and an appeal, the question of the sufficiency of the indictment cannot be raised (People v. Hammersmith, 229 A. D. 385; People v. Willett, 213 N. Y. 368; People v. Wiechers, 179 N. Y. 459). Nor could a writ of error *coram nobis* lie (24 *Corpus Juris Secundum*, p. 147).

That the respondent in this case, in the absence of error in fact, justifying the vacation of the judgment of conviction, is confined to the remedies provided in the Code of Criminal Procedure upon an error of law is made strikingly clear in People v. Rizzo, 246 N. Y. 334. In that case, four defendants had been convicted of attempted robbery. Only Rizzo appealed. The Court of Appeals held that the evidence had failed to establish the crime of attempted robbery and reversed the conviction of Rizzo. The Court held that the others who did not appeal, had no remedy except to apply for executive clemency stating "as the others did not appeal, there is no remedy for them through the courts."

Although the courts should be zealous to protect the constitutional and legal rights of each individual, the protection of the general public should not be jeopardized.

The respondent in this case was denied no constitutional or legal right. There was no fraud in connection with his [fol. 17] conviction. He was not induced through any unfair methods to plead guilty. He was given a privilege to accept a reduced plea. He was placed on probation and

never served one day of his original sentence. As was said in the Wachowicz case "He sought and obtained the benefit that might accrue to him from a finding of guilt for a crime connected with the same transaction, though not necessarily included in the crime charged in the indictment * * * and the defendant who asked the court to render an erroneous judgmetn in a pending judicial proceeding may not thereafter when it suits his convenience, challenge the judgment." Notwithstanding the leniency afforded him, a few years later he was indicted for the crime of robbery in the first degree. Again he was permitted to plead to a lesser crime. The Legislature in its wisdom in order to protect the general public against its predators provided for increased penalties for persistent violators of the law. The respondent is now serving a sentence as a second offender and he should not be released at this time to prey again upon the public.

Courts not of record as well as courts of record possess an inherent power to vacate their judgments (Hogan v. Supreme Court, *supra*). The order vacating or not vacating the judgment is not appealable (People v. Gersewitz, *supra*). A most chaotic condition will result in the criminal practice of this state, if judgments not a nullity, but merely erroneous can be vacated by courts of original jurisdiction. [fol. 18] The order of prohibition prayed for in the petition herein is granted.

Dated: July 1, 1946.

Paul J. Batt (S), Justice of Supreme Court.

IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

NOTICE OF MOTION FOR THE PROHIBITION ORDER

(Same Title)

SIRS:

Please Take Notice that upon the annexed petition of the Commissioner of Correction of the State of New York, verified the 29th day of March, 1946, the undersigned will move before a Special Term of this Court, Part I thereof, to be held in and for the County of Erie, at the County Hall in the City of Buffalo, New York, on the 9th day of

April, 1946 at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard for an order prohibiting the respondent, Honorable Hamilton Ward, Jr., as Judge of the County Court of Erie County, from vacating the judgment of the Erie County Court entered the 16th day of July, 1937, in an action entitled "People of the State of New York against Joseph Paterno," and enjoining and restraining said respondent from taking any of the affirmative steps proposed to be taken in accordance with the opinion of the respondent, Honorable Hamilton Ward, Jr., dated March 20, 1946 and referred to in the [fol. 19] petition annexed hereto, and for such other, further, and different relief as to the court may seem just and proper.

Dated, Buffalo, N. Y., March 29, 1946.

Yours, etc., Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Petitioner, Office and Post Office Address, State Office Building, 65 Court Street, Buffalo, N. Y.; Leo J. Hagerty, Esq., District Attorney of the County of Erie, Amicus Curiae, Office and Post Office Address, Erie County Hall, Buffalo, New York..

To Honorable Hamilton Ward, Jr., Judge of the Erie County Court, County Hall, Buffalo, New York; Mr. Joseph Paterno, Respondent, Box 149, Attica, New York.

[fol. 20] In Supreme Court of New York, County of Erie

Petition

(Same Title)

To the Supreme Court of Erie County:

The petition of John A. Lyons, as Commissioner of Correction of the State of New York, respectfully shows to this Court, upon information and belief, as follows:

1. That the petitioner is the duly appointed Commissioner of Correction of the Department of Correction of the State of New York, and as such is charged with the duty of enforcing the criminal commitments of the courts of the State of New York.

2. That the respondent, Honorable Hamilton Ward, Jr., is a duly elected Judge of the County Court of the County of Erie.

3. That on the 17th day of November, 1941, the respondent, Joseph Paterno, was sentenced to Attica State Prison by the Chautauqua County Court, upon his plea of guilty to the crime of second degree robbery, to a term of not less than 15 years nor more than 30 years as a second offender. That the respondent, Joseph Paterno, was received in Attica State Prison pursuant to said sentence on November 17, 1941, and that he is still at Attica State Prison serving said sentence, which has not expired. That the sentence of the respondent, Joseph Paterno, as a second offender, was based upon his prior conviction for the crime of attempted grand larceny, second degree, in the Erie County Court on July 16, 1937.

[fol. 21] 4. That annexed hereto, marked Exhibit "A", and made a part hereof, is a copy of said judgment of conviction in Erie County Court. That annexed hereto, marked Exhibit "B", and made a part hereof, is a copy of the indictment in connection with the judgment of conviction set forth in Exhibit "A". That annexed hereto, marked Exhibit "C", and made a part hereof, is a copy of the recommendation of the District Attorney of Erie County to the court with respect to the plea referred to in Exhibit "A".

5. That heretofore the respondent, Joseph Paterno, made a motion on or about the 2nd day of January, 1946 before the respondent, Honorable Hamilton Ward, Jr., for an order vacating and setting aside the conviction of the respondent, Joseph Paterno, set forth in Exhibit "A", and for leave to withdraw the plea of guilty interposed by said respondent, and for leave to plead *de novo*. That on the 20th day of March, 1946, the respondent, Honorable Hamilton Ward, Jr., rendered a written opinion dated said date, which opinion will be submitted to the court and is made a part hereof by reference, and in which opinion said respondent provided, among other things, that "the motion is granted," but that the signing and entry of the formal order would be withheld until the 30th day of March, 1946 for the purpose of giving the District Attorney of Erie County or the Attorney-General of the State an opportunity "to proceed against this Court by writ of prohibition or otherwise."

[fol. 22] 6. That the threatened action of the respondent, Honorable Hamilton Ward, Jr., to vacate the judgment set forth in Exhibit "A" is in excess of the jurisdiction of the Court and of said respondent. That the Erie County Court is without authority at this time to vacate the judgment set forth in Exhibit "A" and to allow the respondent, Joseph Paterno, to withdraw his plea of guilty set forth therein, and to permit him to enter a plea of not guilty in its place and stead. That the judgment of the Erie County Court set forth in Exhibit "A" was a legal and proper judgment; that at the time that the same was imposed, the sentencing court had jurisdiction of the person of the respondent, Joseph Paterno, and of the crime for which he was indicted, and of the crime to which he pleaded guilty, and that the sentence imposed was one within the legal power of the court to impose; that the period of probation set forth in said judgment has expired; that the sentencing court is now without jurisdiction to set aside or alter said judgment.

7. That in the event that the respondent, Honorable Hamilton Ward, Jr., pursues the course of action threatened, no appeal from the determination will lie therefrom. That there is no adequate remedy available to prevent the taking of the unauthorized action threatened by respondent, Honorable Hamilton Ward, Jr., except the relief sought herein.

8. That no previous application for the relief sought herein has been made.

[fol. 23] Wherefore, the petitioner requests that this Court issue its order directed to the respondent, Honorable Hamilton Ward, Jr., prohibiting said respondent from vacating the judgment set forth in Exhibit "A" and pursuing the other acts proposed to be taken by said respondent, in accordance with his opinion dated March 20, 1946 hereinbefore referred to, and enjoining and restraining said respondent from taking any affirmative steps in connection therewith, and for such other, further, and different relief as to the Court may seem just and proper.

Dated, March 29, 1946.

John A. Lyons, Commissioner of Correction.

(Verified by Emil L. Cohen, March 29, 1946.)

[fol. 24] EXHIBIT "A" TO PETITION

Certified Copy of Judgment . . . Imprisonment

Sec. 486 Crim. Code

At a Term of the County Court, Held in and for the County of Erie, at the Erie County Hall, in the City of Buffalo, on the 16th Day of July, 1937

Present: Hon. F. B. Thorn, Judge.

16725

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

JOSEPH PATERNO, Defendant

Viol. Sect. 1308 P. L.

The defendant above named having pleaded guilty in this Court, on the 14th day of April, 1937, of the crime of Attempted Grand Larceny 2nd degree, personally appears this day for judgment. The defendant is now asked by the Clerk of this Court whether he has any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged or appearing to this Court why such judgment should not be pronounced, judgment is thereupon pronounced that the said defendant be imprisoned at hard labor in the N. Y. State Prison at Attica, N. Y., for the term of not less than 1 yr. 3 mo. nor more than 2 yrs. 6 mo. Ex. of Sent. suspended. Placed on probation to make [fol. 25] restitution $75.00 cash balance as determined by Prob. Dept.

The defendant testifies that he is 24 years of age, and was born in Raymond, Wash., and is by occupation a Barber.

I Hereby Certify the foregoing to be a true copy of the entry of judgment upon the minutes in the above-entitled action.

Witness my hand and the seal of said Court this 17th day of November, 1943.

A. S. Titus, Deputy County Clerk, of Erie County.
(Seal.)

F5-29-6C-3-43-B. P.

3—583

EXHIBIT "B" TO PETITION

County Court, Erie County

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH PATERNO

The Grand Jury of the County of Erie, by this indictment, accuse Joseph Paterno of the following crime: Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno, on or about the 5th day of October, 1936, at the City of [fol. 26] Tonawanda, in this County, feloniously brought, received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop.

Walter C. Newcomb, District Attorney of the County of Erie. O. K.—P. J. N.

[Endorsed:] No. 16725. County Court, Erie County, October Term, 1935-6. The People against Joseph Paterno, Indictment. Oct. 30, 1936. Violation of Section 1308 of the Penal Law. Walter C. Newcomb, District Attorney.

A True Bill. Frank R. Layor Foreman. Arraigned the 10 day of Nov. 1936. Plead Not Guilty. Counsel J. Bleichfeld. Filed 30th day of Oct. 1936. James V. Walsh, Spec. Dep. Co. Clerk.

[fol. 27] Let to bail Thorn J. on the 10th day of Nov. 1936, in the sum of $2500.00.

2/16/37.

Sentenced to be imprisoned in the N. Y. State Prison, Attica at hard labor for the term of 1 year 3 months, minimum and 2 years 6 months, maximum.

Ex. of sent. suspended placed on probation.

To make restitution 75.00 cash balance as determined by probation dept.

Thorn, J.

4/14/37. Defendant appeared in person withdraws former plea of not guilty and now pleads guilty to Attempted Grand Larc. 2nd degree.

EXHIBIT "C" TO PETITION

County Court, Erie County

Ind. #16,725

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH PATERNO

The above named defendant was indicted on a charge of Criminally Receiving Stolen Property. Only a very small [fol. 28] portion of the stolen property was recovered and that was found in the possession of several admitted inmates of a disorderly house who are of necessity the chief witnesses for the People in this case. For these reasons and because of the character of these witnesses, it is recommended that the defendant be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree.

Walter C. Newcomb, District Attorney of the County of Erie.

Dated: April 14, 1937.

IN SUPREME COURT OF NEW YORK, COUNTY OF ERIE

ANSWER

(Same Title)

The Respondent Joseph Paterno answering the petition herein by Saft, Schweitzer & Sullivan, his attorneys, and alleges as follows:

1. Admits allegations of the petition herein marked "2", "3", "4", "5", and "6", except that part of paragraph "6" which states "that at the time that the same was imposed, the sentencing court had jurisdiction of the person of the respondent, Joseph Paterno, and of the crime for which he was indicted, and of the crime to which he pleaded guilty, and that the sentence imposed was one within the legal power of the court to impose," all of which said respondent denies.

[fol. 29] 2. That he has no knowledge or information sufficient to form a belief as to allegations marked "1" of the petition.

3. Denies each and every allegation of the petition and every part thereof not hereinbefore specifically admitted, controverted or denied.

As and for a First, Separate and Distinct Defense Herein, the respondent Joseph Paterno, further alleges:

4. That prior to his indictment by the Grand Jury of Erie County on October 30th, 1936, he was arraigned in the City Court of Buffalo on an information which charged him with the crimes of burglary 3rd and grand larceny, but pending a hearing the matter was presented directly to the Grand Jury in the form of a single charge only, namely, criminally receiving stolen property, in violation of Section 1308 of the Penal Law. This was the only charge presented to the Grand Jury for its consideration, and the Grand Jury handed up an indictment on said charge for criminally receiving stolen property, in violation of Section 1308 of the Penal Law. No charge of burglary or grand larceny was submitted to the Grand Jury.

5. That the said respondent Joseph Paterno appeared in Part 2 of the Erie County Court on April 14th, 1937 to answer for said crime for which he had been indicted, and was allowed to plead guilty to attempted grand larceny second degree.

6. That the motion herein to set aside said judgment was addressed to the same court in Part 2 of the Erie County [fol. 30] Court and said court retained an inherent jurisdiction over its judgment and after hearing the petitioner therein, the respondent Joseph Paterno, by Saft, Schweitzer & Sullivan, his attorneys (Ralph Saft, Esq., of counsel) and the People of the State of New York by Leo J. Hagerty, Esq., (Maurice Frey, Esq., of counsel), have after the court rendered a written decision consented among other things that the motion be granted.

As and for a Second, Separate and Distinct Defense Herein, the respondent Joseph Paterno, further alleges:

7. That when the respondent Joseph Paterno pleaded

guilty to attempted grand larceny second degree on April 4th, 1937 and the court entered judgment therein, the court was without jurisdiction to accept said plea and to enter said judgment, because the said respondent Joseph Paterno had not been indicted by a Grand Jury for said crime or any other crimes which embodied the elements of the crime or attempted grand larceny second degree.

Wherefore, said respondent Joseph Paterno respectfully demands that the petition herein be dismissed.

Saft, Schweitzer & Sullivan, Attorneys for Respondent; Joseph Paterno, Office & P. O. Address, Suite 502-03, 17 Court St. Bldg., Buffalo, New York.

[fol. 31] To Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Petitioner, Office & P. O. Address, State Office Building, 65 Court St., Buffalo, N. Y.; Leo J. Hagerty, Esq., District Attorney of the County of Erie, Amicus Curiae, Office & P. O. Address, Erie County Hall, Buffalo, New York.

(Verified by Ralph Saft, April 5 ,1946.)

In Supreme Court of New York, County of Erie

Notice of Motion to Dismiss Petition

(Same Title)

Sirs:

Please Take Notice, that upon the notice of motion herein dated March 29, 1946, and the petition of John A. Lyons as Commissioner of Corrections of the State of New York sworn to March 29, 1946, upon which the said notice of motion was based, a motion will be made at Special Term of the New York Supreme Court held in and for the County of Erie at the County Hall in the City of Buffalo, N. Y. on the return day of this proceeding, to wit, April 9, 1946, at ten o'clock in [fol. 32] the forenoon of said day, or as soon thereafter as counsel can be heard, for an order dismissing the petition herein as a matter of law, upon the ground that it appears upon the face of said petition that the same is insufficient in

law in that it does not state facts sufficient to constitute grounds for the relief sought herein.

Dated, Buffalo, N. Y., April 4, 1946.

Yours, etc., Samuel M. Fleischman, Attorney for Respondent Hon. Hamilton Ward, Jr., as Judge of County Court of Erie County, 916 Prudential Bldg., Buffalo, N. Y.

To Hon. Nathaniel L. Goldstein, Attorney General, State of New York; Hon. Leo J. Hagerty, District Attorney, Erie County.

[fol. 33] In County Court of Erie County

The People of the State of New York,

against

Joseph Paterno

Appearances:

Saft, Schweitzer & Sullivan, Attorneys for defendant, Ralph Saft, of counsel, in support of the motion.

Leo J. Hagerty, District Attorney of the County of Erie, Maurice Frey, Assistant District Attorney, of counsel, opposed.

Opinion

Ward, J.:

This is a motion for an order: (1) vacating and setting aside an erroneous conviction of the defendant herein on the 14th day of April, 1937, of the crime of Attempted Grand Larceny 2nd degree; (2) for leave to withdraw the defendant's plea of guilty and to interpose a plea of not guilty; (3) for leave to plead *de novo* * * *".

Joseph Paterno was indicted by the grand jury of Erie County on October 30th, 1936, for the sole indictable offense of Criminally Receiving Stolen Property, in violation of Section 1308 of the Penal Law. Upon arraignment in County Court, he pleaded "not guilty". On April 14th, 1937, the then District Attorney filed a recommendation with the County Court that the defendant be permitted to plead "guilty" to the crime of Attempted Grand Larceny [fol. 34] 2nd Degree. The defendant so pleaded and was

sentenced to Attica Prison for an indefinite term of not less than one year and three months and not more than two years and six months. The execution of this sentence was suspended and the defendant was placed on probation. No appeal was taken from this judgment, and on December 1st, 1938, the defendant was discharged from probation.

On November 17th, 1941, the defendant was indicted by a grand jury in Chautauqua County for the crime of Robbery in the 1st Degree. He pleaded guilty to Robbery in the 2nd Degree in the County Court of that county. An information was filed against him, by the District Attorney of Chautauqua County, charging him with being the same person convicted of the crime of Attempted Grand Larceny, 2nd Degree in Erie County on April 14th, 1937. He admitted that he was the same person, and as a second felony offender was sentenced to Attica Prison for a term of not less than fifteen years nor more than thirty years. This judgment was placed in execution.

Thereafter followed a series of applications and motions, the dates of which are significant.

On September 10th, 1943, he moved in the County Court of Chautauqua County for an order to correct the information filed accusing the defendant of being the same person convicted in Erie County on April 14th, 1937. The motion was denied (People vs. Paterno, 182 Misc. 491, 50 N. Y. S. 2nd 713).

[fol. 35] November 22nd, 1943, the defendant applied for relief from imprisonment by a writ of habeas corpus to the County Court of Wyoming County, challenging the validity of the Erie County judgment of conviction. The writ was dismissed, but the relator was remanded to the custody of the sheriff of Chautauqua County for resentence as a first offender upon the determination by the County Court of Wyoming County that the Erie County judgment was invalid. This order was entered on January 8th, 1944, undoubtedly on the authority of the People *ex rel.* Wachowicz vs. Martin (267 A. D. 803, 47 N. Y. S. 2nd 291), decided December 30th, 1943, by the Appellate Division of the Supreme Court, Fourth Department, but subsequently reversed in People *ex rel.* Wachowicz vs. Martin (293 N. Y. 361, 57 N. E. 2nd 53), hereinafter referred to.

The County Judge of Chautauqua County resentenced Paterno as a first offender to time already served, a period of about two years. From the above order of the Wyoming

County Court the People and the Warden of Attica Prison appealed. In November 22nd, 1944, the now famous case of People *ex rel.* Wachowicz vs. Martin (293 N. Y. 361, 57 N. E. 2nd 53), having been decided by the Court of Appeals on July 19th, 1944, the Appellate Division of the Fourth Department reversed the order of the County Judge of Wyoming County so far as appealed from and remanded the relator to the custody of the warden of Attica Prison for the reasons stated in the Court's memorandum in the [fol. 36] Tracher case (People *ex rel.* Tracher vs. Martin, 268 App. Div. 955, 51 N. Y. S. 2nd 676). In that case the court said, "We think we are precluded from considering these questions by the decision of our Court of Appeals in People *ex rel.* Wachowicz vs. Martin, 293 N. Y. 361, 57 N. E. 2nd 53, which held, in substance, that the validity of the judgment of conviction, under the circumstances, could not be challenged by habeas corpus." No appeal was taken.

The relator being remanded thereby, the original sentence of the County Court of Chautauqua County was reinstated.

Then, on the 11th day of September, 1945, the defendant again moved the County Court of Chautauqua County to correct the information on the grounds that the Erie County judgment was erroneous. This motion was denied.

Now, finally, and on the 27th day of November, 1945, there comes this present motion before this Court.

As to the matter before this Court, it should be kept clearly in mind that this motion is not an application for relief by way of habeas corpus. That a writ will not lie herein is not to be questioned, (People *ex rel.* Wachowicz vs. Martin, 293 N. Y. 361, 57 N. E. 2nd 53) hereinafter referred to as the Wachowicz case. Also, it must be kept in mind that this defendant is not now, nor ever has been confined by virtue of the judgment of the Erie County Court pronounced July 16, 1937, except so far as the conviction thereunder constituted a first felony offense, so as to require a [fol. 37] mandatory increased punishment (Sec. 1941 Penal Law, as amended by L. 1920 c. 571, S2; L. 1936 c. 457, s1, L. 1936 c. 70, s1; L. 1936 c.328, s6, in effect April 9th, 1936).

In the Wachowicz case the defendant pleaded guilty to attempted Grand Larceny 2nd Degree to a count in the indictment accusing him of the crime of Criminally Receiving Stolen property. The Court of Appeals held: "The crime of grand larceny is not necessarily included, for some essential elements of that crime are not essential elements

in the crime charged, and the facts alleged in the indictment, though sufficient to constitute the crime charged therein, would not be sufficient to constitute the crime of grand larceny'' (293 N. Y. 361, 365, 366). The Court also held that there is no statutory authority permitting the Court to amend the indictment to include an accusation of criminal acts independent of any accusation presented by the grand jury in the indictment, and citing People vs. Miles (289 N. Y. 360, 45 N. E. 2nd 910), decided December 11th, 1942, in which case such an amendment had been allowed by the trial court on motion of the People and with the consent of the defendant. The court therein determined that the indictment thus amended and upon which the appellant was convicted was no longer an accusation by a grand jury. Thus the defendant had been deprived of the rights granted to him by Article 1, subd. 6 of the Constitution of the State of New York, that, "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury * * *"

[fol. 38] In the Wachowicz case, by a sharply divided court, it was held that although the crime of attempted grand larceny 2nd degree is a crime not necessarily included in that charged in the indictment, namely, criminally receiving stolen property, the court had general jurisdiction both of the crime charged in the indictment and of the crime to which the defendant had pleaded guilty, and had jurisdiction of the defendant upon his arraignment and plea and in proper circumstances the trial court would have had power to render the judgment therein. It was held that the trial court erred in its determination of the question of law when it ruled that a plea to Attempted Grand Larceny 2nd Degree was a proper plea to an indictment charging Criminally Receiving Stolen Property. Thus, although the judgment was erroneous, the court had jurisdiction and the judgment was not a nullity and habeas corpus would not lie.

The judgment in the motion before this court is erroneous, although not a nullity; and habeas corpus will not lie.

Thus, one of the greatest remedies for relief from imprisonment known to the English, United States or New York State Law is not available to this defendant.

Did he ever have or has he now any relief from such an erroneous judgment?

It is urged by the People that the defendant should have [fol. 39] moved in arrest of judgment or taken an appeal.

As to both of these, it should be borne in mind that this judgment was entered on a guilty plea and that both of these are inconsistent with such a plea. Also, prior to the Wachowicz case the law seems to have been accepted by both prosecution and defendant's attorneys that a plea to Attempted Grand Larceny 2nd Degree was a proper plea to an indictment charging Criminally Receiving Stolen Property. The Wachowicz case established the law to the contrary.

A motion in arrest of judgment would not lie under Section 331 of the Code of Criminal Procedure (L. 1881 c. 442). That section limits such motions to a plea of *not guilty*. Nor would the defendant have prevailed in such a motion by Section 467 of the Code of Criminal Procedure, for although this section permits such a motion "on a plea or verdict of guilty," one can succeed only if he can establish one of the grounds in Section 331 of the Code of Criminal Procedure, and in this instance, the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime. In the Wachowicz case the court determined that the trial court had jurisdiction over the subject of the indictment and that the facts stated did constitute a crime. While the court in the Wachowicz case indicates that had the motions been made as provided in Sections 331 and 467 of the Code of Criminal Procedure, an appeal would have been the proper manner of correcting error on the part of the trial court, it is obvious that in the [fol. 40] present condition of the law as determined by the Wachowicz case the appellant could not have prevailed.

That leaves for consideration the question of appeal from the judgment itself, as provided by Section 515 of the Code of Criminal Procedure (as amended L. 1884 c. 372, s1. eff. May 28, 1884) which states, "and hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding, or special proceeding of a criminal nature, is by appeal."

In Morhous vs. Supreme Court, (293 N. Y. 131, 56 N. E. 2nd 79), the court said at page 140, "An appeal to a higher court is ordinarily the appropriate corrective process for error at the trial, and appearing in the record * * *" In that case a trial was had. That an appeal will not lie to a plea of guilty seems to be the determination of the court in People vs. Wright (263 App. Div. 1020, 33 N. Y. S. 2nd 1009). There the defendant had pleaded guilty to

robbery in the first degree and assault second degree. He appealed from the judgment of conviction and from an order of the County Court denying his motion to set aside the convictions on the ground of newly discovered evidence. The Appellate Division, after affirming the order of the County Court of Monroe County, concluded its memorandum by the court as follows:

1. No power to grant the defendant's motion in any phase is resident in the County Court.

2. Appeal from judgments denied as no appeal lies therefrom.

[fol. 41] As to the ruling of the court in (1), this case was decided before Lyons vs. Goldstein et al. (290 N. Y. 19, 47 N. E. 2nd 425), to be referred to herein at some length below. It would seem that the court held in (2) that no appeal would lie to a judgment of conviction entered upon a plea of guilty.

The statement of the writer in very learned dissenting opinion in the Wachowicz case is illuminating in this respect, wherein he says at page 369, "It is urged that the only available remedy was by appeal from the judgment of conviction. But one who pleads guilty may not appeal unless the judgment is totally void, and if it be void then he is entitled to habeas corpus." The majority of the court held that the judgment was not void. On the authority of this case, the judgment in the present case is not void, therefore, no appeal would have been available to this defendant on his guilty plea.

What other remedy has this defendant? The ancient writ of error *coram nobis* is not available, as this petitioner does not claim that his plea of guilty was induced by fraud.

It, therefore, appears that if this petitioner is to have any relief he must find it in this motion to vacate and set aside the erroneous judgment. That this court has power to grant such motions under certain circumstances is no longer to be questioned. In Lyons vs. Goldstein *et al.* (290 N. Y. 19, 47 N. E. 2nd 425), hereinafter referred to as the Goldstein case, it was held that, "The inherent power [fol. 42] of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted" (290 N. Y. 25). The Court then cited Furman vs. Furman, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629;

Matter of Holden, 271 N. Y. 212, 2 N. E. 2nd 631, and continuing said, "No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent power of the courts to them. The power was exercised in criminal cases at common law through the writ of error *coram nobis*." The court, having previously discussed at some length Section 337 of the Penal Law and Section 2188 of the Penal Law, determined that Section 337 did not preclude the court from allowing a withdrawal of a guilty plea after judgment, and that Section 2188 did not apply to a judgment except in the circumstances set forth therein. In the present case, no consideration need be given to Section 2188 of the Penal Law, as the defendant was never confined by virtue of the judgment and cannot be confined by the judgment now. It is also interesting to note that in the Goldstein case no consideration was given to the question of an appeal.

In People *ex rel.* Hirschberg vs. Grange County Court (271 N. Y. 151, 155, 2 N. E. 2nd 521, 523), it was held that "there was nothing in the Code to prohibit a court from exercising its inherent power to correct mistakes and er- [fol. 43] rors in its judgment." Maybe the word "error" should not be given undue emphasis. However, it is the concern of this court to determine whether it has jurisdiction to correct an erroneous judgment, and such expression by the highest court of the state cannot be overlooked or lightly dismissed. It may be that the court was limiting its consideration to error by clerical mistakes and not error in law.

That the Court of Appeals did not consider the Goldstein case as limiting the circumstances in which a court of original jurisdiction has power to vacate its judgments is evident in People vs. Gersewitz (294 N. Y. 163, 61 N. E. 2nd 427), at page 167, wherein the court said, "The Court has nonetheless recognized, at the same time, that courts have always asserted and exercised authority, which, though perhaps not expressly established by statute, is 'based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives, and to prevent oppression or persecution.' 'It is a power,' the court said,

'which the legislature can neither curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional.' We have sanctioned the exercise of such power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional right of a party. Perhaps that power can have no broader scope. No case has been presented to the court in which the court was called upon to define its exact [fol. 44] limits, but in March, 1943, this court authoritatively decided (three judges dissenting) that a court of criminal jurisdiction has 'Inherent' power to set aside a judgment procured by fraud and misrepresentation and to permit a defendant to withdraw a plea of guilty induced by violation of his constitutional rights, (Matter of Lyons vs. Goldstein, 290 N. Y. 19, 47 N. E. 2nd 425, 146 A. L. R. 1422); and in Matter of Morhous vs. New York Supreme Court, 293 N. Y. 131, 56 N. E. 2nd 79, we held that a motion to vacate a judgment procured by violation of the defendant's constitutional rights is the corrective judicial process which is authorized by the law of the State to remedy the alleged wrong to the defendant and that it adequately meets the requirement of 'due process.' "

The Morhous case just referred to held, among other things, that the present motion is the corrective judicial process to vacate a judgment procured by violation of the defendant's constitutional rights.

The Goldstein case has been followed recently in Frank S. Hogan, as District Attorney of New York County vs. Supreme Court of the State of New York, reported in the New York Law Journal, February 7, 1946, wherein Desmond, J., speaking for the court held, "That Special Sessions is not a court of record does not deprive it of power to entertain *'coram nobis'* applications," and further, "Due process is lacking unless some corrective process is available to them (Mooney vs. Holohan, 294 U. S. 103, [fol. 45] 112, 113. Morhous opinion 293 N. Y. at page 315). A remedy there must be. The only approach to it must be by the only visible route—by motions addressed to the sentencing court."

That this court is not without eminent companionship in its belief that the power of a court to vacate its judgments has not been limited by the Goldstein case is found in the

remarks of the learned John A. Mullen, J., in People vs. Bertram M. Campbell, at the time he ordered a judgment of conviction against Campbell vacated and set aside. "I do not believe that the Court of Appeals intended to limit the inherent power of this Court over its judgment to cases involving fraud or misrepresentation on the part of an officer of the State depriving a defendant of due process of law. I believe the Court of Appeals merely intended that in a case of that nature this court has inherent power over its judgment, but the Court of Appeals did not by any means, as I read the case, decide that this court had not the same inherent power over its judgment in certain other cases. The Court of Appeals did not say what other cases it might apply to, but it certainly did not say that it could not apply to any other type of case, even though in the Gersewitz case it said it may not. We know that the Court of Appeals in those cases had before it only the facts in the case upon which it was passing."

This court does not agree with the conclusion of Judge Mullen in his reference to the Gersewitz case, as appears [fol. 46] from the interpretation of that case set forth above. The above determination by Judge Mullen was not appealed, as no appeal lies to a motion to vacate a judgment (People vs. Gersewitz, 294 N. Y. 162, 61 N. E. 2nd 427).

There can be no doubt that this defendant was deprived of the rights guaranteed to him by Article 1, subdv. 6 of the Constitution of the State of New York. He was indicted for Criminally Receiving Stolen Property. He was convicted of Attempted Grand Larceny 2nd Degree, a crime the commission of which is not necessarily included in that with which he is charged in the indictment, nor a crime of a degree inferior to that charged in the indictment, nor an attempt thereof. He was therefore convicted without due process of law. That the court had jurisdiction as determined in the Wachowicz case is not important. Due process may well be lacking, although jurisdiction exists. In the Wachowicz case the relator sought relief by habeas corpus. The court held that habeas corpus would not lie. This is a motion to vacate an admittedly erroneous judgment, whereby the defendant had been deprived of the rights guaranteed by the Constitution of the State. He has no other relief than this motion. If this be denied to him, he has been deprived of due process. There is no

statutory prohibition to the granting of this order, and this court in attempting to correlate the cases on the subject is constrained to believe that the law is leading to the ultimate determination that a court has inherent power to grant a motion to vacate and set aside its own criminal judgment at any time thereafter, upon its deter- [fol. 47] mination that the judgment is erroneous and that its entry has deprived the defendant of rights guaranteed to him by the Constitution and there is available to the defendant no other remedy.

This petitioner stands before this court without favor. There is nothing in his conduct to merit sympathy or consideration. Questions of law, however, must not be determined by favor or prejudice. The argument of the People that to grant this relief after so long a time would work a hardship on the People in gaining a conviction is without merit. The People are not without fault in making a recommendation to the Court in this matter. If the People were able to convict the defendant of the crime charged in the indictment, the duty rested on the District Attorney to proceed to present the accusation as found by the Grand Jury forthwith. If a bargain was made, both sides bargained. The argument of the People that many similar applications may be made to the courts if this motion be granted has no persuasive value. To the contrary, if this defendant is entitled to relief by this motion, others similarly situated may be equally entitled. It is further urged upon this court that it should proceed with great care and caution in arriving at a determination favorable to this petitioner, as the order of the court is not appealable.

That the determination herein have the benefit of review, this court urges the District Attorney of Erie County or the Attorney General of the State to proceed against this court by writ of prohibition or otherwise, and to that end [fol. 48] the signing and entry of the order herein will be withheld until the 30th day of March, 1946.

The motion is granted. Prepare and submit order accordingly.

Dated at Buffalo, New York, this 15th day of March, 1946.

—— ——, County Judge, Erie County.

HW; cf.

STIPULATION WAIVING CERTIFICATION

(Same Title)

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties in the above entitled action that the foregoing are true and correct copies of the Notice of Appeal, Order Appealed From, and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of Erie, and certification of the same is hereby waived, pursuant to Section 170 of the Civil Practice Act.

Dated: Buffalo, New York, August —, 1946.

Saft, Schweitzer & Sullivan, Attorneys for Respondent-Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Petitioner-Respondent.

[fol. 49] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an Order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant.

STATEMENT UNDER RULE 234

On July 1, 1946 Honorable Paul J. Batt, Justice of the Supreme Court, granted an order prohibiting the Honorable Hamilton Ward, Jr., as Erie County Court Judge from vacating the judgment of the Erie County Court entered the 16th day of July, 1937 in an action entitled "People of the State of New York vs. Joseph Paterno". On appeal by Joseph Paterno to the Appellate Division of the Supreme Court, Fourth Department, said order was unanimously affirmed. Joseph Paterno now appeals to this Court.

There has been no change of parties or attorneys except that the Honorable Carlton A. Fisher has been substituted for the Honorable Hamilton Ward, Jr., as Erie County Court Judge by order of the Appellate Division.

[fol. 50] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant.

NOTICE OF APPEAL TO THE COURT OF APPEALS

Please take notice that pursuant to leave granted by the Court of Appeals in the above entitled action by an order duly made and filed in the Office of the Clerk of that Court on the 2nd day of July, 1947, the above named respondent-appellant hereby appeals to the Court of Appeals from the judgment of affirmance herein entered in the office of the Clerk of the County of Erie on the 16th day of May, 1947, pursuant to the order of the Appellate Division of the Fourth Department duly entered herein, the judgment in all things unanimously affirmed the judgment of the Supreme Court of Erie County, entered herein on the 29th day [fol. 51] of July, 1946; and this appeal is from each and every part of said judgment.

Saft, Schweitzer & Sullivan, Attorneys for Respondent-Appellant, Office and P. O. Address, Suite 502-03, 17 Court St. Bldg., Buffalo, New York.

To: Nathaniel L. Goldstein, Attorney General of the State of N. Y., Attorney for Petitioner-Appellant, 65 Court Street, Buffalo, New York. Samuel M. Fleischman, as Amicus Curiae for the County Judge, Prudential Building, Buffalo, N. Y.

[fol. 52] IN COURT OF APPEALS OF NEW YORK

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the second day of July, A. D. 1947.

Present: Hon. John T. Loughran, Chief Judge, Presiding.

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant

ORDER GRANTING LEAVE TO THE RESPONDENT-APPELLANT TO APPEAL TO THE COURT OF APPEALS

A motion for leave to appeal to the Court of Appeals in the above cause being duly made upon the part of the respondent appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is granted.

John Ludden, Clerk (Seal.)

[fol. 53] At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 29th day of April, 1947.

Present: Hon. Marsh N. Taylor, Presiding Justice; Hon. William F. Dowling, Hon. Samuel J. Harris, Hon. Francis D. McCurn, Hon. William F. Love, Associate Justices.

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Respondent,

For an order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Appellant

ORDER APPEALED FROM

The above named Joseph Paterno, respondent in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Supreme Court, entered in the office of the Clerk of the County of Erie, on the 29th day of July, 1946, and the said [fol. 54] appeal having been submitted by Mr. Ralph Saft, of counsel for the appellant, and argued by Mr. Samuel M. Fleischman, as *amicus curiae* for the County Judge, and by Emil L. Cohen, of counsel for the respondent, and due deliberation having been had thereon

It Is Hereby Ordered, that the order so appealed from be, and the same hereby is affirmed without costs of this appeal to any party.

Opinion by Harris, J.

All concur.

Enter, Marsh N. Taylor.

Entered 30th day of April, 1947.

Herbert E. Wait, Clerk.

[fol. 55] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

No. 5664

No. 478/282

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction, etc., Petitioner-Respondent,

For an Order directed to HONORABLE HAMILTON WARD, JR., as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant

Argued November 13, 1946.
Decided April 30, 1947.

Present: Honorable Marsh N. Taylor, Presiding Justice. Honorable William F. Dowling, Honorable Samuel J. Harris, Honorable Francis D. McCurn, Honorable William F. Love, Associate Justices.

Appeal from Order of Erie Special Term, (Batt, J.,) prohibiting Ward, J. of Erie County Court, from taking [fol. 56] any affirmative steps for the vacating of a judgment of conviction against Joseph Paterno.

Order entered July 29, 1946.

APPEARANCES:

Messrs. Saft, Schweitzer & Sullivan, (Ralph Saft, Esq., of Counsel), Suite 502-03, 17 Court Street, Buffalo, N. Y., for Appellant Paterno.

Hon. Nathaniel L. Goldstein, (Emil L. Cohen, Esq., of Counsel), The Capitol, Albany 1, N. Y., for Petitioner.

Hon. Leo J. Hagerty, District Attorney of Erie County, (Morris Frey, Esq., of Counsel), County Hall, Buffalo 2, N. Y.

Samuel M. Fleischman, Esq., Prudential Building, Buffalo, N. Y., for Respondent, Judge of the County Court of Erie County.

OPINION FOR AFFIRMANCE

HARRIS, J.:

By resort to the provisions of Article 78, Civil Practice Act, the petitioner-respondent herein, as Commissioner of Correction of the State of New York, has secured an order in the nature of prohibition, restraining the County Court of Erie County and one of its Judges from proceeding further on the application of Joseph Paterno, respondent-appellant herein, which application, addressed to the County Court of Erie County, asks that Court and a Judge thereof to permit the said Paterno to withdraw a plea of guilt and to be permitted to plead anew to an indictment. Paterno [fol. 57] became a party to this proceeding by his answer to the petition of the Commissioner of Correction.

A Grand Jury of the County Court of Erie County, at the October 1936 Term of such County Court, returned an indictment against Paterno, accusing Paterno of the following crime:—"Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously bought, received, concealed and

withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop." Paterno was arraigned in the County Court on the 10th day of November, 1936, plead not guilty to the indictment, and subsequently on the 14th day of April, 1937, with the consent of the District Attorney of Erie County, in such County Court plead to such indictment guilty to the crime of attempted grand larceny second degree. On July 16, 1937, judgment and sentence of the Court was pronounced on such plea. The sentence was to State Prison for not less than one year and three months, and not more than two years and six months. The execution of such sentence was suspended and the defendant placed on probation. He did not move in stay of judgment, and no appeal was taken from the judgment. Paterno did [fol. 58] not serve any portion of the sentence in State Prison, and on December 1, 1938, he was discharged from probation.

On November 17, 1941, Paterno was indicted by a Grand Jury in Chautauqua County for the crime of robbery in the first degree. He was permitted to plead guilty to robbery in the second degree in the County Court of that County. The District Attorney of Chautauqua County, prior to his sentence on this robbery conviction, filed an information against him charging him with being a second felony offender because of the above described plea to attempted grand larceny in the second degree in Erie County on April 14, 1937. He admitted being the same person and, as a second felony offender, he was sentenced to State Prison for a term of not less than fifteen years, nor more than thirty years. This judgment was placed in execution and he is now serving the sentence thereunder in State Prison. Intermediate the sentence in the Chautauqua County Court and the beginning of the present proceeding the appellant has made various applications to be relieved from the effect of his plea to the crime of attempted grand larceny in Erie County, his objective being to avoid the penalty of being a second felony offender, which penalty was meted out to him in Chautauqua County as above stated. One of his applications was to correct the information laid by the District Attorney of Chautauqua County. This motion was denied, (People v. Paterno, 182 Misc. 491). He then applied for an order of habeas corpus. This application [fol. 59] was dismissed, but he was remanded to the cus-

tody of the Sheriff of Chautauqua County for resentence as a first offender. From such resentence the People and the Warden of the State Prison appealed; on such appeal the order to resentence was reversed by this Court on the authority of People ex rel. Wachowicz v. Martin, 293 N. Y. 361, and the relator (Paterno) remanded to the custody of the Warden of the State Prison. From this reversal, no appeal was taken. Later the defendant again moved the County Court of Chautauqua County to correct the information, and such motion was denied.

On the 27th day of December, 1945, Paterno applied to the County Court of Erie County and a Judge thereof for an order vacating the judgment entered upon his plea of guilty in Erie County in 1937, on the ground that the Erie County Court at that time improperly accepted a plea of attempted grand larcency second degree, under an indictment for criminally receiving stolen property. This motion came on to be heard before the Honorable Hamilton Ward, Jr., then a County Judge of Erie County, (now a Justice of the Supreme Court of the State of New York); after argument and due consideration, the County Judge wrote an opinion stating that he was about to grant the motion of the appellant (Paterno) and would permit Paterno to withdraw his plea of April 14, 1937, and make a new plea under the indictment for criminally receiving stolen property returned in the County Court of Erie County in October, 1936, under which indictment Paterno [fol. 60] had previously plead guilty to the crime of grand larceny second degree. At this point the proceeding now under review was begun on the application of the Commissioner of Correction of the State of New York. The Special Term of the Supreme Court of Erie County, in this proceeding, issued an order prohibiting the Judge of the County Court of Erie County from vacating the judgment of the Erie County Court entered on the 16th day of April, 1937, and from taking any affirmative steps which would permit Paterno to withdraw his plea of April 14, 1937, on which judgment was pronounced July 16, 1937. Such prohibition and restraint were granted on the ground that any such steps or action taken by the County Judge would be in excess of the authority of the County Court of Erie County and of any Judge thereof. (Civil Practice Act, Article 78, Sections 1283, 1284-(4), 1287, 1290; See In the Matter of Lyons, as Commissioner, etc., v. Gold-

stein, as Judge, etc., 290 N. Y. 19; People *ex rel.* Childs v. Extraordinary Trial Term, 228 N. Y. 463.)

The County Judge, as *amicus curiae*, and the appellant Paterno here attack such order of prohibition and ask its reversal on the ground that the County Court and the Judge thereof had the inherent power to grant the relief prayed for by Paterno on his motion in County Court, and which relief the County Judge indicated he would grant to Paterno. The *amicus curiae* and the appellant have argued at Special Term, and argue here, that the plea of guilt to the crime of attempted grand larceny second [fol. 61] degree and the judgment entered thereon, was erroneous (See People *ex rel.* Wachowicz v. Martin, 293 N. Y. 361) and that Paterno's constitutional rights were invaded by the entry of such judgment. They claim that the only remedy that Paterno has had, or has, is by the present motion; they assert that, having plead guilty, he never could have had relief from such judgment by a motion to vacate the same, or by appeal. Habeas corpus has not been, and is not, available to Paterno. (Matter of Morhous v. N. Y. Supreme Court, 293 N. Y. 131; People *ex rel.* Wachowicz v. Martin, 293 N. Y. 361.) There is authority that both a motion in arrest of judgment (Code of Criminal Procedure, Sections 467-469) and the right to appeal (Code of Criminal Procedure, Section 515) were both available to Paterno after his plea which is now under discussion. (People v. McDonnell, 92 N. Y. 657; Sherwin v. People, 100 N. Y. 351; Canizio v. N. Y., 66 Sup. Ct. Rep. 452, 453, 90 Law Ed. (Adv.) 393.) He failed to make such a motion, and he did not appeal from the judgment. The time for him to have taken either of these steps has long ago passed. Paterno is now asking the County Court to exercise what is termed its "inherent power" in his behalf by a process corresponding to the procedure on *coram nobis*. This early English process (Jacques v. Cesar, 2 Saunders (English) 100; Volume 2, Williams Notes on Saunders, pp. 293-345) has recently been the subject of discussion in the appellate courts of this State and in recent years in courts of sister-states (In the Matter of Hogan, as [fol. 62] District Attorney, v. Court of General Sessions, etc., and Shapiro, 296 N. Y. p. 1. (Advance Sheets No. 390); Matter of Hogan v. New York Supreme Court, etc. and Katz, et al., 295 N. Y. 92; In the Matter of Lyons, as Commissioner, etc. v. Goldstein, as Judge, etc., 290 N. Y. 19;

Sanders v. State, 85 Ind. 318; George v. State, 211 Ind. 429; Jones v. Commonwealth, 269 Ky. 772; 18 C. J. S. *Coram Nobis* p. 281; 24 C. J. S. Criminal Law, Section 1606) and it has been determined that in a proper case such an application (*coram nobis*) is cognizable by the court of original jurisdiction. An analysis study of the origin and history of the remedy known as "*coram nobis*" shows that in both the English courts and the courts of the United States it was, and has been available only to correct an error of fact, which error of fact is exclusively within the knowledge of the court of original jurisdiction; and that the remedy of *coram nobis* will only be invoked and used where there is no other remedy available to a person sentenced to and held in prison in violation of his constitutional rights. Its office is to avoid the effect of a fraud on the court and the one accused of crime, which fraud deprived the accused of his basic right of a fair trial by an impartial jury. It lies in the court of original jurisdiction because there is deposited the knowledge of the facts pertaining to and surrounding the conviction. So closely has the use of this remedy (*coram nobis*) been restricted, that it is not available, even where no other remedy exists, [fol. 63] to have set aside a plea on the ground of newly discovered evidence though such newly discovered evidence is unimpeached and goes to the essence of the guilt or innocence of the applicant. (Sanders v. State, 85 Ind. 318; George v. State, 211 Ind. 429; Jones v. Commonwealth, 269 Ky. 772. We have not here a situation that calls for the application of the remedy afforded by *coram nobis*. Here the appellant seeks to avoid a penalty placed on him by an error in law and not one of fact. Substantial errors of law prejudicial to a defendant, may be corrected on appeal; other errors of law need not be so corrected. (Code of Criminal Procedure, Section 452.). Appeal from a judgment of conviction in this State does not lie as a matter of constitutional right but solely by legislative enactment.

The appellant herein in the County Court of Erie County, after his indictment, sought and received a favor. He was in no way compelled or coerced into pleading to the crime of attempted grand larceny in the second degree. His indictment was for a crime cognizable by the County Court, and he himself was under the jurisdiction of the court. It is true that the crime of attempted grand larceny second degree is not necessarily included under a charge of crimi-

nally receiving stolen property (the then indictment against Paterno) (People ex rel. Wachowicz v. Martin, 293 N. Y. 361) but one can conceive a set of facts under which one guilty of criminally receiving stolen property could be guilty of larceny in unlawfully withholding the [fol. 64] stolen property from the owner thereof. (Penal Law, Section 1290; see People v. Vitolo, 271 App. Div. 959 (Advance Sheets No. 411); 136 A. L. R. 1091; and 2 Wharton on Criminal Law, Sections 1122 and 1168.) It must be true that of all the persons in the courtroom at the time of his plea, Paterno best knew whether or not he was guilty of the crime to which he plead, which crime grew out of, and was connected with the circumstances of the crime for which he was indicted. He chose to say that he was an actor in the crime which was the subject of the indictment, at least, to the extent of having committed attempted grand larceny second degree. An error of law there may have been when the Court accepted his plea, but it was not such an error for which he now has a remedy. His plea is to be distinguished from that of the defendant in People ex rel. Battista v. Christian, 249 N. Y. 314, where, in violation of his constitutional rights, the relator was arraigned without indictment, and from that of the defendant in People v. Miles, 289 N. Y. 360, in which Miles case the defendant was tried on an amendment to the indictment, which amendment was in no way related by facts or time to the charges in the original indictment itself. The last two mentioned cases were examples of violation of constitutional rights. Here, we have a mere error of law that was in no way harmful or prejudicial to Paterno. It was an error of law of which he took advantage to his benefit. To say that correction of such an error must or should lead to the remedy sought by Paterno [fol. 65] herein, would be to discard common sense and the ordinary proper administration of criminal law.

The order at Special Term, from which appeal is taken here, should be affirmed.

Stipulation Waiving Certification

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties in the above entitled action that the foregoing is a copy of the record as printed

in the Appellate Division, the Notice of Appeal to the Court of Appeals, Order Granting Leave to the Respondent-Appellant to Appeal to the Court of Appeals, Order Appealed From, Opinion for Affirmance of the Appellate Division, Fourth Department, and all of the papers upon which the Court below acted in making the Order Appealed From and the whole thereof, now on file in the office of the Clerk of the County of Erie, and certification of the same is hereby waived, pursuant to Section 170 of the Civil Practice Act.

Dated: Buffalo, New York, August —, 1947.

Saft, Schweitzer & Sullivan, Attorneys for Respondent-Appellant. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Petitioner-Respondent.

[fol. 66] In Court of Appeals of New York

In the Matter of the Application of John A. Lyons, as Commissioner of Correction &c., Petitioner, Respondent,

For an order directed to Honorable Carlton A. Fisher, as Judge of the County Court of Erie County, Respondent, and Joseph Paterno, Appellant

Remittitur—October 16, 1947

Be It Remembered, that on the 5th day of September in the year of our Lord one thousand nine hundred and forty-seven, Joseph Paterno, the appellant in this cause, came here unto the Court of Appeals, by Saft, Schweitzer & Sullivan, his attorneys, and filed in the said Court a Notice of Appeal and Return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And John A. Lyons, as Commissioner of Correction &c., and ano., the respondents in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General and

Which said Notice of Appeal and Return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Ralph Saft of counsel for the appellant, and by Mr. Emil L. Cohen of counsel for the petitioner-

respondent, and due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed without costs, as aforesaid.

[fol. 67] And hereupon, as well the Notice of Appeal and Return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in said Supreme Court, before the Justices thereof &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 16, 1947:

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 68] At a Special Term of the Supreme Court, held in and for the County of Erie, at the Court House in the City of Buffalo, N. Y., on the 23rd day of October, 1947.

Present: Hon. Alger A. Williams, Justice of the Supreme Court.

In the Matter of the Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York, Petitioner-Respondent,

For an Order directed to HONORABLE CARLTON A. FISHER, as Judge of the County Court of Erie County, Respondent, and JOSEPH PATERNO, Respondent-Appellant

ORDER ON REMITTITUR—Filed October 23, 1947

The respondent-appellant above named having appealed to the Court of Appeals from an order of the Appellate Division, Fourth Department, entered in the Office of the Clerk of that Court, on the 30th day of April, 1947, and from the judgment of affirmance entered in the Office of the Clerk of Erie County on the 16th day of May, 1947, which order and judgment affirmed an order entered in the Office of the Clerk of Erie County on July 29, 1946, prohibiting the County Judge of Erie County from vacating a judgment of the County Court of Erie County entered on the 16th day of July, 1937, in an action entitled "People of the State of New York against Joseph Paterno," and enjoining and restraining the said County Judge of Erie County from taking any affirmative steps proposed to be taken by him in accordance with the opinion dated March 20, 1946; and said appeal having been argued by Mr. Ralph Saft of counsel for the appellant and by Mr. Emil L. Cohen, Assistant Attorney General of counsel for the petitioner-respondent, and the Court of Appeals, after due deliberation had thereon, having ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from be affirmed without costs, and having further [fol. 69] ordered that the record and proceedings in the Court of Appeals be remitted to the Supreme Court, there to be proceeded upon according to law, and the remittitur of the Court of Appeals having been filed in the office of

the Clerk of Erie County on the 23rd day of October, 1947.

Now, on motion of Nathaniel L. Goldstein, Attorney-General, attorney for the petitioner-respondent herein, it is

Ordered that the said order and judgment of the said Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered that the order of the Appellate Division so appealed from be, and the same hereby is, affirmed without costs.

Alger A. Williams, Justice of Supreme Court.

Granted Oct. 23, 1947.

James V. Walsh, Sp. Dep. Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 69a] [File endorsement omitted.]

[fol. 70] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 233, Misc.

JOSEPH PATERNO, Petitioner,

vs.

JOHN A. LYONS, Commissioner of Correction of the State of New York

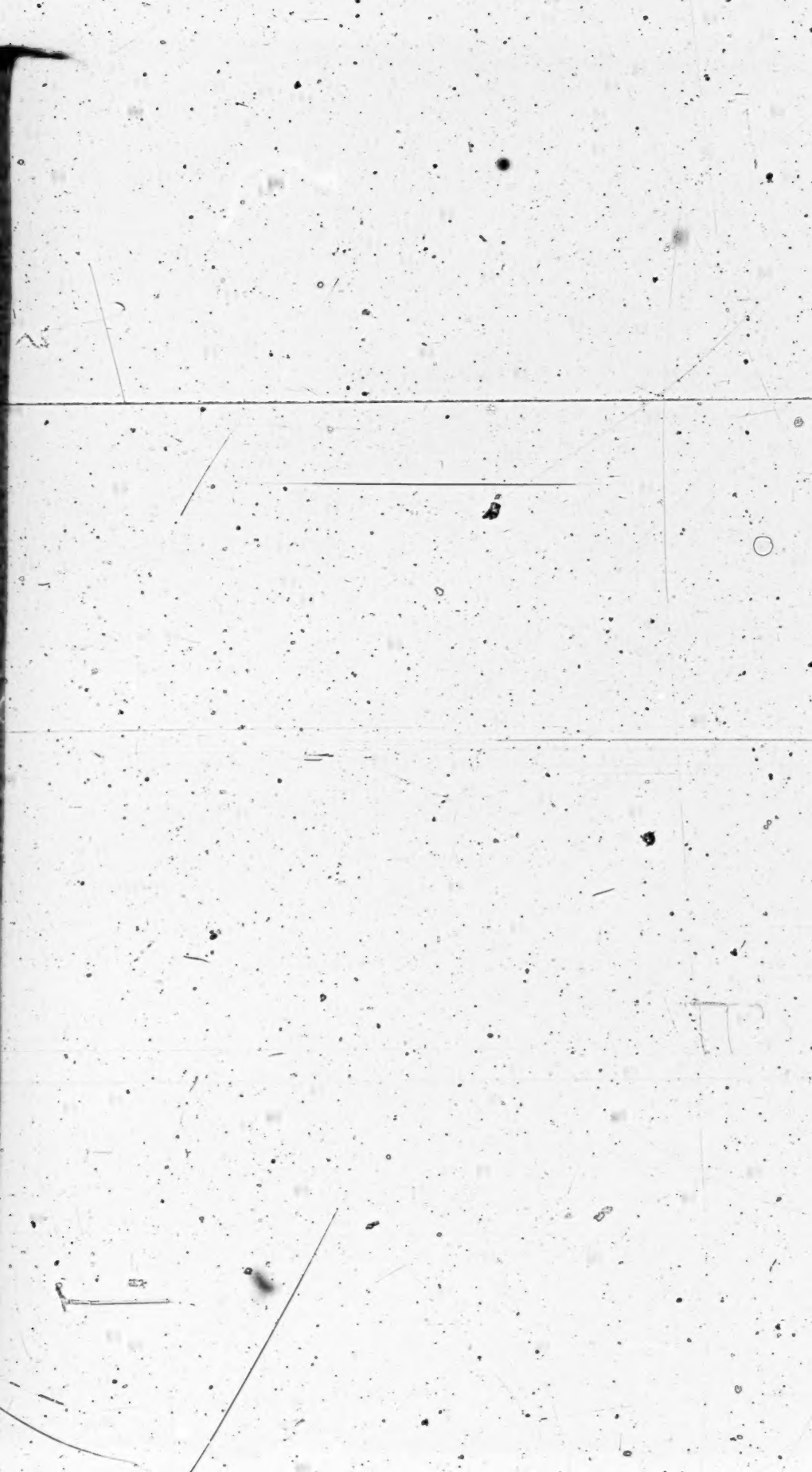
ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—February 9, 1948

On petition for writ of Certiorari to the Court of Appeals of the State of New York.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be,

and the same is hereby, granted and the case is transferred to the appellate docket as No. 583, October Term, 1947.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 52,813. New York, Court of Appeals. Term No. 583. Vide 233 Misc. Joseph Paterno, Petitioner, vs. John A. Lyons, as Commissioner of Correction of the State of New York. Petition for writ of certiorari and exhibit thereto. Filed December 12, 1947. Term No. 583 O. T. 1947.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 583

JOSEPH PATERNO,

Petitioner,

vs.

JOHN A. LYONS, AS COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER, JOSEPH PATERNO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

WILLIAM H. COLLINS,
844 Shoreham Building,
Washington 5, D. C.,
Attorney for Petitioner.

INDEX

	Page
Jurisdictional statement	1
Statement of case	2
Summary of argument	4
Argument 1	4
2	4
3	4
4	4
Conclusion	11

Statutes

United States Constitution, Fifth and Fourteenth Amendments	2
New York State Constitution, Article I, subd. 6	5
Section 237, Judicial Code (28 U.S.C. 344)	1
Section 1308, New York Penal Code	4
Section 331, New York Code Criminal Procedure (L. 1881 c. 442)	5
Section 467, New York Code Criminal Procedure	6
Section 515, New York Code Criminal Procedure (L. 1884 c. 372 s. 1 eff. May 28, 1884)	6

Citations

Gayes, Petitioner v. *State of New York*, decided June 23, 1947, 91 L. Ed. No. 17, page 1549	9
Lyons v. *Fisher and Paterno*, 75 N. E. (2nd) 630, 631	11
Lyons v. *Goldstein*, 290 N. Y. 19	6, 7
Malinski v. *New York*, 324 U. S. 416, 417	10
Marino, Petitioner v. *Ragen, Warden*, 92 L. Ed. No. 5, page 203	7
Morhous v. *N. Y. Supreme Court*, 293 N. Y. 131, 56 N. E. (2nd) 79	8
People v. *Gersewitz*, 294 N. Y. 163	8
People v. *Miles*, 289 N. Y. 360	5
People v. *Paterno*, 182 Misc. 491, 50 N.Y.S. (2nd) 713	3

Page

People ex rel. Tracher v. *Martin*, 268 App. Div. 955, 51 N. Y. S. (2nd) 697 3

People ex rel. Wachowicz v. *Martin*, 267 A. D. 803, 47 N. Y. S. (2nd) 291 ..... 3, 5

People ex rel. Wachowicz v. *Martin*, 293 N. Y. 361, 57 N. E. (2nd) 531 3

People v. *Wright*, 263 A. D. 1020, 33 N.Y.S. (2nd) 1009 6

Robinson vs. *Johnston*, 9 Cir., 118 F. 2nd 998 8

United States v. *Mayer*, 238 U. S. 55, 67, 35 S. Ct. 16, 59 L. Ed. 129 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 583

JOSEPH PATERNO,

Petitioner,

vs.

JOHN A. LYONS, AS COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER, JOSEPH PATERNO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdictional Statement

Jurisdiction of this Court is invoked under Section 237 of the Judicial Code (28 U. S. C. 344) which empowers this Court to require, by certiorari, that there be certified to it for review and determination, any cause determined by the highest court of the state, where any title, right, privilege, or immunity is claimed under the United States Constitution. The petitioner, Joseph Paterno, contends that the decision of the New York Court of Appeals violates

the Fifth and Fourteenth Amendments of the United States Constitution because it deprives him of his liberty without due process of law.

This Court in No. 233 Misc. on February 9, 1948, granted relief to proceed in forma pauperis and granted writ of certiorari to the Court of Appeals of the State of New York.

Statement of Case

The petitioner, Joseph Paterno, was indicted by the Erie County Grand Jury on October 30, 1936 for the crime of criminally receiving stolen property (R. 16) in violation of Section 1308 of the New York Penal Law. Arraigned on this charge he pleaded not guilty. Subsequently, on April 14, 1937, the District Attorney filed a recommendation with the County Court that the defendant be permitted to plead guilty to the crime of attempted grand larceny, second degree (R. 17). The court accepted the plea of the defendant to the new charge and on July 16, 1937 petitioner was sentenced to a term of one year and three months to two years and six months, the execution of which was suspended and petitioner was placed on probation conditioned on the making of restitution. The probation in this case was completed.

On the 17th day of November, 1941, the petitioner was indicted by a grand jury in Chautauqua County for the crime of robbery in the first degree and pleaded guilty to robbery in the second degree. The petitioner admitting that he was the same person convicted of the crime of attempted grand larceny, second degree, in Erie County, on April 14, 1937, was sentenced as a second felony offender for a term of not less than fifteen years nor more than thirty years. The petitioner is serving that sentence.

The petitioner has made a series of applications and motions. On September 10, 1943, he moved in the Chautau-

qua County Court for an order to correct the information filed which accused him of being the same person convicted in Erie County on April 14, 1937. This motion was denied, as reported in *People* v. *Paterno*, 182 Misc. 491, 50 N. Y. S. (2nd) 713 (R. 21).

On November 22, 1943, he filed a writ of habeas corpus in the County Court of Wyoming County challenging the validity of the Erie County conviction. The writ was dismissed but the petitioner was remanded to the custody of the sheriff of Chautauqua County for resentence as a first offender upon the determination by the County Court of Wyoming County that the Erie County judgment was invalid. This order was entered on January 8, 1944, presumably on the authority of *People ex rel. Wachowicz* v. *Martin*, 267 A. D. 803, 47 N. Y. S. (2nd) 291. This case was subsequently reversed in *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. (2nd) 531 (R. 21). The County Judge of Chautauqua County resentenced the petitioner to time already served, a period of about two years. The state and the warden of the prison appealed this change of sentence. The Appellate Division of the Fourth Department reversed the order of the County Judge of Wyoming County and remanded the petitioner to the Custody of the warden of Attica Prison for reasons further found in the Tracher case (*People ex rel. Tracher* v. *Martin*, 268 App. Div. 955, 51 N. Y. S. (2nd) 697). The effect of this action was to reinstate the original sentence by the Chautauqua County Court (R. 21-22).

On the 11th day of September, 1945, the petitioner again moved the County Court of Chautauqua County to correct the information on the basis that the Erie County judgment was erroneous. This motion was denied (R. 22).

Finally, on the 27th day of November, 1945, the petitioner filed the present motion in the Erie County Court in which

be had originally pleaded guilty to attempted grand larceny in the second degree on April 14, 1937 (R. 22). This motion was to vacate the sentence, to permit the withdrawal of the plea of guilty, and enter a plea of not guilty.

Summary of Argument

1. THE APPELLANT HAS BEEN DEPRIVED OF A FUNDAMENTAL RIGHT THROUGH THE ACCEPTANCE OF HIS PLEA IN VIOLATION OF THE CONSTITUTION OF THE STATE OF NEW YORK.

2. THERE IS NO REMEDY AVAILABLE TO APPELLANT EXCEPT THIS MOTION TO SET ASIDE THE JUDGMENT IN THE COURT OF ORIGINAL JURISDICTION.

3. THE ERIE COUNTY COURT HAS INHERENT POWER TO SET ASIDE ITS ERRONEOUS JUDGMENT WHICH DEPRIVED APPELLANT OF A FUNDAMENTAL RIGHT.

4. FUNDAMENTAL RIGHTS OF PETITIONER SHOULD NOT BE DENIED ON TECHNICAL GROUNDS WHEN THE EFFECT OF SUCH IS TO DEPRIVE HIM OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

ARGUMENT

The appellant has been deprived of a fundamental right through the acceptance of his plea in violation of the Constitution of the State of New York.

The indictment in the Erie County Court charged the offense of Criminally Receiving Stolen Property in violation of Section 1308 of the New York Penal Law. The court's acceptance of the plea of guilty to the crime of attempted grand larceny second degree under this indictment was for all practical purposes a permitting of the District Attorney to amend the indictment to include this new crime for which the grand jury had not indicted the accused.

Admittedly the charge of attempted grand larceny second degree is a felony under New York Penal Law and as such can only be laid by indictment of a grand jury because

Article I, subd. 6 of the Constitution of the State of New York provides—

> "No person shall be held to answer for a capital or other infarmous crime unless on a presentment or indictment of a grand jury . . . ."

The decisions of the State of New York confirmed the fact that acceptance of the plea in the Erie County Court was erroneous. *People* v. *Miles*, 289 N. Y. 360. In this case, at page 364, the court amongst other things said—

> "Accordingly, prosecutions must be conducted in substance and without essential change as the Constitution commands. A conviction otherwise obtained is a nullity."

In the case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N.E. (2nd) 53, the court stated that a judgment entered upon an erroneous determination of the question of law by a court of competent jurisdiction is not a nullity and may not be challenged by a writ of *habeas corpus*. The plea in this case was identical with that in the petitioner's case. The Court of Appeals in this case did not say what the remedy was except to declare that the remedy was not *habeas corpus*.

There is no remedy available to appellant except this motion to set aside the judgment in the court of original jurisdiction.

The State of New York urges that the petitioner might have moved in arrest of judgment or taken an appeal. However, neither of these steps would be consistent with a plea of not guilty.

A motion in arrest of judgment would be limited by Section 331 of the Code of Criminal Procedure to a plea of guilty (L. 1881 c. 442) (R. 9).

Section 467 of the Code of Criminal Procedure (R. 9-10) would not be available to the petitioner because although that section permits such a motion, "on a plea or verdict of guilty," defendant must establish one of the grounds in Section 331 of the Code of Criminal Procedure in order to prevail. That ground would be that the court had no jurisdiction over the subject of the indictment, or that the facts stated do not constitute a crime. Under the *Wachowicz* case, however, it has already been determined that the facts do constitute some crime and that the Trial Court had jurisdiction over the subject of the indictment.

The only possible course left to the petitioner would be an appeal from the judgment itself as contemplated in Section 515 of the Code of Criminal Procedure, L. 1884 c. 372 s. 1 eff. May 28, 1884 (R. 9). However, in the case of *Lyons* v. *Goldstein*, 290 N. Y. 19, and the case of *People* v. *Wright*, 263 A. D. 1020, 33 N. Y. S. (2nd) 1009, it was held that no appeal would lie from a judgment of conviction entered upon a plea of guilty.

It is of interest to note that in the dissent opinion in the *Wachowicz* case, at page 369, it was stated—

> "It is urged that the only available remedy was by appeal from the judgment of conviction. But one who pleads guilty may not appeal unless the judgment is totally void, and if it be void then he is entitled to habeas corpus."

The majority of the Court, however, in this case held that the judgment was not void. If the judgment in this case is not void then it must be concluded that no appeal would have been available to this petitioner from the judgment based upon his plea of guilty. A study of the State of New York's position in this case makes most pertinent the language used by Mr. Justice Rutledge in his concurring

opinion in the case of *Marino, Petitioner*, v. *Ragen, Warden Illinois State Penitentiary*, decided December 22, 1947—

> "It is that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one. If the only state remedy is the possibility that the Attorney General will confess error when he determines that a flagrant case will not survive scrutiny by this Court, it is hardly necessary to point out that the federal courts should be open to a petitioner even though he has not made his way through several courts applying for habeas corpus, then writ of error, and finally coram nobis. * * *
>
> "* * * If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court. This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error before getting a hearing in a federal court. * * * We should neither delay nor deny justice, nor clog its administration with so useless and harmful a procedural strangling of federal constitutional rights."

The Erie County Court has inherent power to set aside its erroneous judgment which deprived appellant of a fundamental right.

In the case of *Lyons* v. *Goldstein*, 290 N. Y. 19, the Court pronounced as follows:

> "The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted. *Furman* vs. *Furman*, 153 N. Y. 309, 47 N. E. 577, 60 Am. St. Rep. 629; Matter of Holden, 271 N. Y. 212, 2 N.E. 2d 631. No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases.

There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them. The power was exercised in criminal cases at common law through the writ of error coram nobis. *Robinson* vs. *Johnston*, 9 Cir., 118 F. 2nd 998; *United States* vs. *Mayer*, 238 U. S. 55, 67, 35 S. Ct. 16, 59 L. Ed. 129. If the judgment may be reviewed and set aside on the ground that it was procured by fraud, no reason presents itself why the court may not then permit the withdrawal of a plea of guilty because the record is then the same as if no judgment had ever been rendered. Indeed, it is settled that to deny a person an opportunity to be heard on proof that he was defrauded or coerced into pleading guilty to a crime would impair a constitutional right. *Walker* vs. *Johnston*, supra; *Waley* vs. *Johnston*, supra. It would be an extraordinary reversal of all precedent to deny to a competent tribunal power over its own judgments in either civil or criminal cases."

Again, in the case of *People* v. *Gersewitz*, 294 N. Y. 163, the Court said:

"We have sanctioned the exercise of such a power by a court to correct its own record or to set aside an order or judgment which was induced by fraud or procured in violation of a constitutional right of a party. Perhaps that power can have no broader scope. No case has been presented to the court in which the court was called upon to define its exact limits, but in March, 1943, this court authoritatively decided (three judges dissenting) that a court of criminal jurisdiction has 'inherent' power to set aside a judgment procured by fraud and misrepresentation and to permit a defendant to withdraw a plea of guilty induced by violation of his constitutional rights (citing case); and in *Matter of Morhous* vs. *N. Y. Supreme Court* (293 N. Y. 131), we held that a motion to vacate a judgment procured by violation of the defendant's constitutional rights is the

corrective judicial process which is authorized by the law of the State to remedy the alleged wrong to the defendant and that it adequately meets the requirement of 'due process'."

It would seem to follow that if a court has an inherent right to set aside its judgment procured through fraud or misrepresentation it would have the same power to set aside its judgment entered by error. If the District Attorney had made a misrepresentation to the appellant under these cases there would appear no question that the judgment could be set aside. Certainly it would seem that the petitioner would be as much misled if he acquiesced in erroneous procedure by the District Attorney and the Court as he would if he had been deliberately told a falsehood.

The procedure followed by the petitioner in this case and which is now before this court has previously been considered in the case of *Gayes, Petitioner, v. State of New York*, decided by this Court on June 23, 1947. In the last paragraph of page 2 majority opinion Mr. Justice Frankfurter states as follows:

> "In accordance with New York procedure, Gayes pro se, filed in the County Court of Monroe County, New York, an application to vacate the judgment rendered against him in that court on July 28, 1938."

On page three of the dissent in this case, written by Mr. Justice Rutledge, the following is stated:

> "Under all the New York decisions which have passed upon the questions, the proper and apparently the necessary procedure, see *People* vs. *Keller*,— Misc.—, 37 N. Y. S. 2d 61, 62, for attacking a sentence as second offender, upon the ground that the former conviction was invalid, is first by motion in the court imposing the initial sentence to vacate it, after which if the motion is successful the sentence for the second offense may be attacked and vacated."

The only difference in the procedure followed in the Gayes case and this case is that in the Gayes case the Supreme Court of New York being the court of last resort in that particular situation, the case was certified from there to the Supreme Court. In this case the Erie County Court Justice having announced his intention to vacate the sentence, was then prohibited from doing so by the Appellate Division of the Supreme Court of New York, from which decision there was the right of appeal to the Court of Appeals of the State of New York, which court is the last resort that the petitioner had in the State of New York.

Fundamental rights of petitioner should not be denied on technical grounds when the effect of such is to deprive him of his liberty without due process of law.

No one contends that the original plea of guilty and sentence thereon in the Erie County Court has any justification in law, but on the contrary all concede it was completely without support in law. The question here presented, therefore, is whether or not that which should be done in law will be done or whether it will be defeated of accomplishment because of technicality.

In this connection it would appear quite appropriate to quote the very pertinent words of Mr. Justice Frankfurter in the case of *Malinski* vs. *New York*, 324 U. S. 416-417, wherein he states——

> "To come concretely to the present case, the question is not whether the record permits a finding, by a tenuous process of phychological assumptions and reasoning, that Malinski by means of a confession was forced to self-incrimination in defiance of the Fifth Amendment. The exact question is whether the criminal proceedings which resulted in his conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.

> Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review. But there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty."

The opinion of Mr. Justice Ward (R. 20-29) is a most erudite analysis of the law applicable to this situation and neither the memorandum decision of Justice Batt of the Supreme Court of New York (R. 3-11) nor the bare memorandum decision of the Court of Appeals, State of New York, 75 N.E. (2nd) 630, 631, 297 N. Y. 617, constitutes an answer to Justice Ward's position.

Conclusion

The premises considered, it is urged that the Writ of Prohibition granted by Honorable Paul J. Batt, Justice of the Supreme Court of New York, enjoining and prohibiting

the Erie County Judge from hearing and determining the motion and petition of the petitioner, be reversed and the County Court of Erie County, New York, directed to vacate and set aside the sentence of the petitioner on the 14th day of April, 1937, for the crime of attempting grand larceny second degree, and that leave be granted to the petitioner to withdraw plea of guilty heretofore entered and interpose a plea of not guilty.

Respectfully submitted,

WILLIAM H. COLLINS,
844 Shoreham Building,
Washington 5, D. C.,
Attorney for the Petitioner,
Joseph Paterno, by Appointment of this Court.

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IN THE

Supreme Court of the United States

October Term, 1947.

No. ~~233 MISC.~~ 583

In the Matter
of
The Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York,
Respondent-Petitioner,
For an Order directed to Honorable CARLTON A. FISHER, as Judge of the County Court of Erie County,
Respondent,
and
JOSEPH PATERNO,
Petitioner-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

NATHANIEL L. GOLDSTEIN,
Attorney General of the State of New York,
Attorney for Respondent-Petitioner,
The Capitol,
Albany 1, New York.

WENDELL P. BROWN
Solicitor General,
IRVING I. WAXMAN
EMIL L. COHEN
Assistant Attorneys General,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX

	PAGE
Statement	1
Opinions Below	2
Jurisdiction	3
Facts	3
The Issue	5
POINT I	6
The decision of the New York Court of Appeals does not deprive petitioner of his liberty without due process of law.	
Conclusion	9
It is respectfully submitted that the petition for writ of certiorari should be denied.	

STATUTES CITED

United States Constitution	6
Amendment V	3, 6
Amendment XIV	3, 6
28 United States Code § 344	3
New York Code of Criminal Procedure	7
Section 337	7
Sections 467-469	8
Section 515	7
Section 517	7, 8

CASES CITED

Canizio v. *New York*, 327 U. S. 82	7, 9
Dowdell v. *United States*, 221 U. S. 325	7
Frank v. *Magnum*, 237 U. S. 309	7
Gayes v. *New York*, 332 U. S. 145	9

II.

	PAGE
Hallinger v. *Davis*, 146 U. S. 314	6
Hurtado v. *California*, 110 U. S. 516	7
Jack v. *Kansas*, 199 U. S. 372	6
People v. *McDonnell*, 92 N. Y. 657	7
People v. *Paterno*, 182 Misc. 491	5
People ex rel. Paterno v. *Martin*, 268 App. Div. 956	5
People ex rel. Wachowicz v. *Martin*, 293 N. Y. 361	5
Sherwin v. *People*, 100 N. Y. 351	7

IN THE

Supreme Court of the United States

October Term, 1947.

No. .....

In the Matter
of
The Application of JOHN A. LYONS, as Commissioner of Correction of the State of New York,
Respondent-Petitioner,

For an Order directed to Honorable CARLTON A. FISHER, as Judge of the County Court of Erie County,
Respondent,

and

JOSEPH PATERNO,
Petitioner-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner prays for a writ of certiorari to review a decision of the New York Court of Appeals made on October 16, 1947, unanimously affirming an order of the Appellate

Division of the New York Supreme Court, Fourth Judicial Department, entered in the office of the Clerk thereof on April 30, 1947 (fol. 157)* which order unanimously affirmed an order of the Special Term of the New York Supreme Court, entered in the office of the Erie County Clerk on July 29, 1946 (fol. 7). This order of the Special Term of the Supreme Court, so affirmed, granted the application of respondent-petitioner John A. Lyons, as Commissioner of Correction of the State of New York, for an order prohibiting the Hon. Hamilton Ward, Jr., as Judge of the County Court of Erie County, from vacating the judgment of the Erie County Court entered on July 16, 1937, in an action entitled "*People of the State of New York* v. *Joseph Paterno.*"

While petitioner's appeal was pending in the State courts, the Hon. Hamilton Ward, Jr. became a Justice of the Supreme Court. Accordingly, his successor, the Hon. Carlton A. Fisher, as Judge of the County Court of Erie County, was substituted in his place in this proceeding by order of the Appellate Division, entered March 5, 1947 (fol. 147).

Opinions Below

The New York Court of Appeals rendered its decision without opinion. Its memorandum decision is reported in 297 N. Y. 617. The opinion of the Appellate Division of the Supreme Court is reported in 272 App. Div. 120. The opinion of the Special Term of the New York Supreme Court, allowing the order of prohibition, is not reported, but is printed at folios 14-52 of the record in the New York Court of Appeals. The opinion of the Erie County Court

* All folio references herein are to the printed record in the New York Court of Appeals, a copy of which has been submitted to this Court by petitioner.

in favor of granting the order vacating the judgment of the Erie County Court entered on July 16, 1937, similarly is not reported, but is printed at folios 97-142 of the record in the New York Court of Appeals.

Jurisdiction

This Court's jurisdiction is invoked under Section 237 of the Judicial Code (28 U. S. C. § 344), authorizing this Court to require, by certiorari, that there be certified to it for review and determination, any cause determined by the highest court of a state, where any title, right, privilege, or immunity is claimed under the United States Constitution. Petitioner has alleged that the decision of the New York Court of Appeals violated the Fifth and Fourteenth Amendments to the United States Constitution by depriving him of his liberty without due process of law.

Facts

Petitioner, Joseph Paterno, was indicted by the Grand Jury of Erie County, New York, on October 30, 1936 for the crime of criminally receiving stolen property (fols. 75-80). On November 10, 1936 he was arraigned and pleaded not guilty in the presence of his counsel (fol. 78). On April 14, 1937 petitioner again appeared in court, withdrew his former plea of not guilty and pleaded guilty to attempted grand larceny, second degree (fol. 80). That plea was accepted by the court upon the district attorney's recommendation that petitioner be permitted to plead guilty to such a "reduced charge" (fol. 82). On July 16, 1937, petitioner was sentenced to a term of one year and three months to two years and six months, execution of

which was suspended, and petitioner was placed on probation to make restitution of $75 (fols. 7-4).

Subsequently, on November 17, 1941, petitioner was sentenced to Attica State Prison by the County Court of Chautauqua County, New York, upon his plea of guilty to the crime of robbery, second degree. He was sentenced as a second offender to a term of not less than fifteen years nor more than thirty years. Petitioner's 1937 conviction in the Erie County Court was used as the basis for sentencing him as a second offender. Petitioner is still serving the Chautauqua County Court sentence in Attica State Prison, which sentence, by its terms, has not yet expired (fols. 59-60).

The proceedings below, which petitioner seeks to have this court review, originally were commenced by a motion to the Erie County Court, in the nature of *coram nobis*, to vacate the judgment entered upon petitioner's plea of guilty in 1937, upon the ground that the Erie County Court improperly accepted the reduced plea of guilty to attempted grand larceny, second degree under an indictment charging him with criminally receiving stolen property. The Judge of the Erie County Court before whom such motion was made indicated in an opinion that he was about to grant petitioner's motion, but urged that the District Attorney or Attorney General proceed against the Court by a writ of prohibition in order that the appellate courts might determine whether or not the Erie County Court had jurisdiction to grant petitioner's motion (fols. 41-2).

Accordingly, the present prohibition proceeding was brought in the Supreme Court to enjoin the Erie County Judge from proceeding with any of the steps proposed to be taken by him, as indicated in his opinion. The order of prohibition was granted by the Special Term of the New

York Supreme Court on the ground that the Erie County Court did not have jurisdiction to grant petitioner's motion, and such order of the Special Term was unanimously affirmed by the Appellate Division of the New York Supreme Court, with opinion; the order of the Appellate Division then was unanimously affirmed by the New York Court of Appeals, without opinion.

Prior to the present motion to the Erie County Court, petitioner had contested his incarceration by means of a writ of habeas corpus. The Appellate Division of the New York Supreme Court ordered that such writ of habeas corpus be dismissed on the ground that the remedy of habeas corpus was not available to petitioner (*People ex rel. Paterno* v. *Martin*, 268 App. Div. 956). The basis for the Appellate Division's decision was the case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, involving an identical situation, where the New York Court of Appeals held that in such cases habeas corpus was not proper.

Following this dismissal of his writ of habeas corpus petitioner made a motion to the County Court of Chautauqua County to vacate the judgment of conviction rendered in 1941, whereby petitioner was sentenced as a second offender, and petitioner moved for resentence. Petitioner based his motion upon a claim that the prior sentence by the Erie County Court was improper. The Chautauqua County Court denied petitioner's motion for resentence on the ground that it had no jurisdiction to entertain such a collateral attack upon the judgment of the Erie County Court (*People* v. *Paterno*, 182 Misc. 491).

The Issue

The sole question before this Court is whether the decision of the New York Court of Appeals to the effect that

the common law remedy of *coram nobis* is not available to petitioner to correct an alleged error of law made by the sentencing court, deprived petitioner of due process of law in violation of the United States Constitution.

We urge that no constitutional right of petitioner has been violated, inasmuch as various remedies were made available to petitioner by state law at the time of his conviction to correct any error of law which may have been made by the sentencing court.

POINT I

The decision of the New York Court of Appeals does not deprive petitioner of his liberty without due process of law.

Although petitioner relies on the Fifth as well as the Fourteenth Amendment to the United States Constitution in support of his position, this discussion is limited to an examination of petitioner's rights under the Fourteenth Amendment only, in view of the fact that the Fifth Amendment is a restriction on the Federal government only, and has no application to state action (*Hallinger* v. *Davis*, 146 U. S. 314, 319; *Jack* v. *Kansas*, 199 U. S. 372, 379-80).

The case at bar is not one where the State has not provided any method for the correction of errors of law which may have been made by the trial court. Various remedies were available to petitioner at the time of his first conviction. The fact that petitioner did not avail himself of such remedies at that time should not be considered as sufficient to support a claim that rights guaranteed by the due process clause have been violated. This argument, which will not be discussed, is all aside from the fact that the particular error of the sentencing court upon which

petitioner relies—that the court improperly accepted a plea of guilty to a crime not necessarily included in the indictment—did not constitute a violation of petitioner's constitutional rights. This Court has repeatedly held that indictment by a grand jury is not essential for due process (*Hurtado* v. *California*, 110 U. S. 516; *Frank* v. *Mangum*, 237 U. S. 309; *Dowdell* v. *United States*, 221 U. S. 325).

In the first place, under the provisions of the New York Code of Criminal Procedure petitioner could have appealed from the judgment of conviction of the Erie County Court, and any error of law could then have been corrected by the appellate courts (N. Y. Code of Criminal Procedure §515-17). It should be noted that all the facts upon which petitioner bases his claim of error appear on the face of the record. The record of petitioner's conviction by the Erie County Court in 1937 shows that petitioner was indicted for the crime of criminally receiving stolen property, and that record also shows that petitioner pleaded guilty under that indictment to the crime of attempted grand larceny, second degree. There is no reliance on any factor such as fraud or perjured testimony, which might have come to light some time after petitioner's conviction. Thus, had petitioner sought appellate review of his conviction within the statutory time provided therefor, which has long since expired, the appellate courts could have rectified any error in the ruling of the trial court (*Sherwin* v. *People*, 100 N. Y. 351; *People* v. *McDonnell*, 92 N. Y. 657).

Petitioner had other remedies available to him at the time of his conviction in 1937. Under Section 337 of the New York Code of Criminal Procedure petitioner could have moved at any time before judgment was rendered, to withdraw his plea of guilty and substitute a plea of not guilty (*Canizio* v. *New York*, 327 U. S. 82, 86). If such a motion

were improperly denied and judgment entered, an appeal could have been taken from the judgment of conviction, and upon such an appeal the intermediate order denying the application to withdraw the plea of guilty could have been reviewed (N. Y. Code of Criminal Procedure, § 517). A third alternative which was open to petitioner was to move in arrest of judgment after his plea of guilty, on the ground that the facts stated in the indictment did not constitute a crime (N. Y. Code of Criminal Procedure §§ 467-469).

In view of the existence of these corrective remedies which were available to petitioner at the time of his conviction, notwithstanding the fact that no remedy may now exist some ten years later when petitioner decides to raise the question, it is respectfully submitted that petitioner's contention of violation of the due process clause is without merit. As was pointed out by the Appellate Division of the New York Supreme Court below, petitioner sought and received a favor after his indictment. He was in no way compelled or coerced into pleading to the reduced charge. His indictment was for a crime cognizable by the Erie County Court and he himself was under the jurisdiction of that Court. Of all the persons in the courtroom at the time of his plea petitioner best knew whether or not he was guilty of the crime to which he plead, which crime grew out of, and was connected with, the circumstances of the crime for which he was indicted. There may have been an error of law when the court accepted his plea, but it was in no way harmful or prejudicial to petitioner and it was not such an error for which he now has a remedy. And, as the Appellate Division concluded, to say that correction of such an error must or should lead to the remedy sought by petitioner herein would be to disregard common sense and the ordinary proper administration of criminal law.

We urge that the principle set forth by this Court in the cases of *Canizio* v. *New York*, 327 U. S. 82 and *Gayes* v. *New York*, 332 U. S. 145 is likewise applicable here. As was stated in the Gayes opinion (page 148) with reference to the holding in the *Canizio* case, "whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand".

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: December 31, 1947.

NATHANIEL L. GOLDSTEIN
Attorney General of the State of New York,
Attorney for Respondent-Petitioner,
The Capitol,
Albany 1, New York.

WENDELL P. BROWN
Solicitor General,

IRVING I. WAXMAN.
EMIL L. COHEN
Assistant Attorneys General,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1947

No. 583

JOSEPH PATERNO,

Petitioner,

against

JOHN A. LYONS, as Commissioner of Correction of the State of New York,

Respondent.

BRIEF FOR RESPONDENT

NATHANIEL L. GOLDSTEIN
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany 1, New York

WENDELL P. BROWN
Solicitor General,
IRVING I. WAXMAN
EMIL L. COHEN
Assistant Attorneys General,
of Counsel.

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BATAVIA, N. Y.

INDEX.

PAGE

Opinions of the Courts Below 1

Jurisdiction 2

Statement 2

Facts 2

Summary of Argument 5

Argument

Point I—No corrective remedy by means of a collateral proceeding need be supplied by the State to correct an allegedly erroneous ruling of law by a State court where the error complained of did not operate to deprive petitioner of any right guaranteed to him by the United States Constitution 7

Point II—The Erie County Court's acceptance of petitioner's plea of guilty to the crime of attempted larceny, under an indictment charging him with criminally receiving stolen property, did not deprive petitioner of due process of law 12

A. The Erie County Court had jurisdiction over petitioner's person and over the offense with which he was charged 12

B. The indictment under which petitioner's plea of guilty was accepted, and the court's acceptance of such pleas, complied with the requirements of the due process clause 13

Point III—Petitioner requested and received a favor from the Erie County Court by its acceptance of his plea of guilty to a reduced charge; petitioner should not now be permitted to attack this judgment rendered at his request 17

PAGE

Conclusion 23

The judgment of the New York Court of Appeals should be affirmed 24

STATUTES CITED.

United States Constitution
Amendment V 2, 5, 22
Amendment XIV 2, 5, 6, 9
New York State Constitution
Article 1, Section 6 7
New York Civil Practice Act § 1231 8
New York Code of Criminal Procedure
Section 39, subd. 2 12
Section 337 18
Section 445 12
Section 467 18
Sections 515-520 17
Section 517 ..... 17, 18, 19
Section 520 17
New York Penal Law, Article 122 13

CASES CITED.

Bergemann v. Backer, 157 U. S. 655 15
Canizio v. New York, 327 U. S. 82 ..... 18, 21, 22
Central Land Co. v. Laidley, 159 U. S. 103 10
Dimmick v. Tompkins, 194 U. S. 540 15
Dowdell v. United States, 221 U. S. 325 16
Ex Parte Parks, 93 U. S. 18 15
Ex Parte Watkins, 3 Pet. 193 15
Ex Parte Yarbrough, 110 U. S. 651 15
Fielden v. Illinois, 143 U. S. 452 7
Frank v. Mangum, 237 U. S. 309 ..... 9, 16

PAGE

Garland v. Washington, 232 U. S. 642 16
Gayes v. New York, 332 U. S. 145 22
Goto v. Lane, 265 U. S. 393 14
Hallinger v. Davis, 146 U. S. 314 5
Howard v. Fleming, 191 U. S. 126 15
Hurtado v. California, 110 U. S. 516 15
In re Converse, 137 U. S. 624 10
In re Coy, 127 U. S. 731 15
In re Eckart, 166 U. S. 481 15
Jack v. Kansas, 199 U. S. 372 5
Johnson v. Zerbst, 304 U. S. 458 11
Jones v. Buffalo Creek Coal Co., 245 U. S. 328 10
Knewel v. Egan, 268 U. S. 442 14
Louisville & Nashville R. Co. v. Schmidt, 177 U. S. 230 16
Lyons v. Goldstein, 290 N. Y. 19 ..... 8, 17
Macino v. Ragen, 332 U. S. 561 19
Morhous v. Supreme Court, 293 N. Y. 131 8
Moss v. Ramey, 239 U. S. 538 7
New York ex rel. Whitman v. Wilson, 318 U. S. 688 8
Parker v. Illinois, 333 U. S. 20, 21
People v. Gersewitz, 294 N. Y. 163 17
People v. Paterno, 182 N. Y. Misc. 491 4
People v. Wright, 263 N. Y. App. Div. 1020 18
People ex rel. Paterno v. Martin, 268 N. Y. App. Div. 956 5
People ex rel. Prince v. Brophy, 273 N. Y. 90 19
People ex rel. Wachowicz v. Martin, 293 N. Y. 361 .. 5, 7, 13, 18, 19
Sunal v. Large, 332 U. S. 174 ..... 10, 11
Worcester County Co. v. Riley, 302 U. S. 292 10
Yakus v. United States, 321 U. S. 414 22

IN THE

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October Term, 1947

No. 583

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against

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Respondent.

BRIEF FOR RESPONDENT

Opinions of the Courts Below

The New York Court of Appeals rendered its unanimous decision of affirmance without opinion. Its memorandum decision is reported in 297 N. Y. 617. The opinion of the Appellate Division of the New York Supreme Court, also unanimous, is reported in 272 N. Y. App. Div. 120. The opinion of the Special Term of the New York Supreme Court is not reported, but is printed at pages 3-11 of the Record. The opinion of the Erie County Court is reported in 187 N. Y. Misc. 56.

Jurisdiction

This Court granted certiorari to the New York Court of Appeals on February 9, 1948, and ordered the case transferred to the appellate docket (R. 43). The basis for petitioner's petition for a writ of certiorari was a claim that the decision of the New York Court of Appeals deprived him of his liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Statement

The proceedings herein were commenced by respondent's application to a Special Term of the New York Supreme Court for an order prohibiting the County Judge of the County of Erie, New York, from granting an order vacating the judgment of conviction of the Erie County Court, entered on July 16, 1937 in an action entitled "*People of the State of New York* v. *Joseph Paterno*" (R. 12).

The Special Term of the Supreme Court granted the order of prohibition on the ground that the Erie County Court was without jurisdiction to grant the proposed order vacating its judgment (R. 2, 11), and this order of prohibition was unanimously affirmed by the Appellate Division of the New York Supreme Court (R. 32) and also by the New York Court of Appeals (R. 40).

Facts

On October 30, 1936 the Grand Jury of Erie County, New York, returned an indictment against petitioner Joseph Paterno, accusing him of the following crime (R. 16):

> "Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appro-

priated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously bought, received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop."

Petitioner was arraigned on November 10, 1936, was represented by counsel, and pleaded not guilty (R. 16). Subsequently, on April 14, 1937, petitioner again appeared in court, withdrew his former plea of not guilty, and pleaded guilty to the crime of attempted grand larceny, second degree (R. 16). That plea of guilty was accepted by the court upon the district attorney's written recommendation that petitioner "be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree" (R. 15, 17). On July 16, 1937, petitioner was sentenced to state prison for a term of 1 year, 3 months to 2 years, 6 months, execution of which was suspended and petitioner was placed upon probation (R. 15). He did not move for a stay of judgment nor did he appeal from the judgment of conviction. Petitioner was discharged from probation on December 1, 1938 and never actually served any portion of that sentence.

On November 17, 1941, petitioner was sentenced to state prison by the County Court of Chautauqua County, New York, upon his plea of guilty to the crime of robbery, second degree, under an indictment charging him with robbery, first degree. He was sentenced as a second felony offender to a term of not less than fifteen years nor more than thirty years. Petitioner's 1937 conviction in the Erie County Court of attempted grand larceny, second degree, was used as the basis for sentencing him as a second offender. Petitioner is still serving the sentence imposed by the Chautau-

qua County Court, which sentence, by its terms, has not yet expired (R. 13, 17).

On January 2, 1946, petitioner made a motion in the Erie County Court for an order vacating and setting aside his 1937 conviction in that Court (R. 13, 17). The contention urged by petitioner in support of his motion was that the Erie County Court erred in accepting a plea of guilty to the crime of attempted grand larceny, second degree, under an indictment charging him with criminally receiving stolen property. The Judge of the Erie County Court before whom this motion was made indicated in an opinion that he was about to grant petitioner's motion, but urged that he, as County Judge, be proceeded against by an application to the State Supreme Court for a writ of prohibition, in order that the appellate courts might have an opportunity to determine whether or not the Erie County Court had jurisdiction to grant petitioner's motion (R. 29). This procedure was followed, and, as pointed out above, the New York Court of Appeals held that the Erie County Court did not have such jurisdiction.

Prior to this motion to the Erie County Court, petitioner had instituted a proceeding in the Chautauqua County Court to vacate the judgment of conviction rendered by that Court in 1941, whereby petitioner was sentenced as a second offender. Petitioner based his motion upon a claim that the prior sentence by the Erie County Court was improper. The Chautauqua County Court denied petitioner's motion for resentence on the ground that it did not have jurisdiction to entertain such a collateral attack upon the judgment of the Erie County Court (*People* v. *Paterno*, 182 N. Y. Misc. 491) (R. 35-6).

Following this denial of his motion, petitioner sought to contest his incarceration by means of a writ of *habeas*

corpus, but the Appellate Division of the New York Supreme Court ordered that such writ of *habeas corpus* be dismissed on the ground that the remedy of *habeas corpus* was not available to correct the error complained of (*People ex rel. Paterno* v. *Martin*, 268 N. Y. App. Div. 956). The basis for the Appellate Division's decision was the case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, involving an identical situation, where the New York Court of Appeals held that in such cases as this *habeas corpus* was not a proper remedy (R. 35-6). Later petitioner again moved the County Court of Chautauqua County to vacate the judgment of conviction, and such motion again was denied (R. 36).

Summary of Argument

Although petitioner relies on the Fifth as well as the Fourteenth Amendment to the United States Constitution, this discussion is limited to an examination of petitioner's rights under the Fourteenth Amendment only, in view of the fact that the Fifth Amendment is a restriction on the Federal government only, and has no application to state action (*Hallinger* v. *Davis*, 146 U. S. 314, 319; *Jack* v. *Kansas*, 199 U. S. 372, 379-80).

Inasmuch as the New York Court of Appeals has never directly passed upon the legality of a plea of guilty to attempted grand larceny, second degree, under an indictment charging the crime of criminally receiving stolen property, we cannot concede that the acceptance of such a plea by the Erie County Court constituted error. However, in view of the dictum of the Court of Appeals in this respect, we shall assume for present purposes that the Erie County Court did err when it accepted petitioner's plea of guilty, and we shall also assume that such ruling would have constituted

reversible error had a timely appeal from the judgment of conviction been taken to the appellate courts. Carrying our position one step further, neither do we dispute the fact that the State does not now provide petitioner with any remedy whereby this allegedly erroneous ruling may be corrected.

These preliminary considerations herein thus having been disposed of, there remains for this Court's determination only the question of whether the State must provide petitioner with a remedy at this time in order to satisfy the requirements of the due process clause of the Fourteenth Amendment.

It is our position that no corrective remedy by means of a collateral proceeding need now be supplied by the State to correct an allegedly erroneous ruling of law by a State court, where such error did not operate to deprive petitioner of any right guaranteed to him by the United States Constitution. We further urge that inasmuch as the Erie County Court had properly acquired jurisdiction over petitioner and had general jurisdiction of the crime with which he was charged, and in view of the fact that all other requisites of due process were carefully observed throughout the entire proceeding, the acceptance by that Court of petitioner's plea of guilty, although such ruling may have been erroneous, did not deprive petitioner of any Federal constitutional right. Ample means to correct any error which may have been made by the trial court were available to petitioner at the time of his conviction in 1937. By not taking advantage of these remedies at that time, petitioner should be deemed to have waived the alleged error of which he complains here.

Petitioner requested and received a favor from the Erie County Court by its acceptance of his plea of guilty to a reduced charge. Petitioner should not now be permitted to attack the judgment rendered at his request.

POINT I

No corrective remedy by means of a collateral proceeding need be supplied by the State to correct an allegedly erroneous ruling of law by a state court where the error complained of did not operate to deprive petitioner of any right guaranteed to him by the United States Constitution.

By way of preface to the ensuing argument, we urge that this Court should take cognizance of the fact that the contention set forth in petitioner's main argument, on pages 4-5 of his brief, to the effect that petitioner was denied certain rights in violation of the New York State Constitution, is inapposite. This Court has repeatedly acknowledged its lack of jurisdiction to review a state court's interpretation of the provisions of a state constitution. In the case of *People ex rel. Wachowicz* v. *Martin, supra,* 293 N. Y. 361, the New York Court of Appeals held that the procedure followed in that case, which was the same as in the case at bar, satisfied the requirement of Article I, Section 6, of the New York Constitution that infamous crimes be prosecuted by indictment of a grand jury.

We further submit that petitioner is likewise precluded from arguing in this Court that the Erie County Court has inherent power to set aside petitioner's judgment of conviction (*Cf.* Petr's. Br. pp. 7-10). The New York Court of Appeals below expressly held that under New York practice the County Court did not have such power. This ruling by the highest State court on a question of State procedure should be deemed binding on this Court (*Moss* v. *Ramey,* 239 U. S. 538; *Fielden* v. *Illinois,* 143 U. S. 452).

Adequate remedies now exist in New York State whereby any person convicted, or deprived of his liberty, in violation of the provisions of the United States Constitution

may collaterally attack such conviction or incarceration. Relief by means of a writ of *habeas corpus* is available where the sentencing court did not have jurisdiction either over the person of the defendant, or general jurisdiction over the offense with which he was charged (New York Civil Practice Act § 1231). And, as a result of judicial decisions, even in those cases where the court did have jurisdiction, the common law writ of *coram nobis* has been held to be available to vacate a judgment of conviction procured by fraud *dehors* the record. (*Morhous* v. *Supreme Court*, 293 N. Y. 131; *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Lyons* v. *Goldstein*, 290 N. Y. 19). Therefore, in those instances where a sentencing court never properly acquired jurisdiction or where it was divested of its jurisdiction because of the subsequent infringement of a defendant's constitutional right, relief may be had by the utilization of these collateral remedies. It is respectfully submitted that the existence of these remedies constitutes an adequate system whereby any person convicted or incarcerated in New York State in violation of his constitutional rights may secure his release from confinement.

In the case at bar petitioner cannot take advantage of any of these remedies because he has never been deprived of any right guaranteed to him by the United States Constitution. Petitioner complains that a State court made an erroneous ruling on a question of law, and there is no remedy now available to correct that error. But, unless that alleged error infringed upon petitioner's constitutional rights so as to divest the sentencing court of jurisdiction, no collateral remedy need be supplied by this State at the present time. In this respect the New York Court of Appeals has held that even if the ruling of the trial court herein accepting petitioner's plea of guilty be deemed to

have been erroneous, that error did not have the effect of divesting the trial court of jurisdiction so as to make relief by *habeas corpus* available; and, inasmuch as the error was one of law and not one of fact, the Court of Appeals also held that *coram nobis* did not lie.

Viewing this case in the light of the foregoing discussion, we find that even though an error of law may have been made by the sentencing court, it was not such an error as would have the effect of nullifying that court's judgment by divesting the court of jurisdiction; therefore the State need not supply petitioner with a collateral remedy.

The Fourteenth Amendment to the United States Constitution does not guarantee that the decisions of the state courts shall be free from error not affecting constitutional rights. This Court has consistently held that a writ of *habeas corpus* is not available to correct an error of law made by a court exercising competent jurisdiction over the person of the petitioner and over the crime with which he was charged. By so holding, this Court has recognized the fact that a judgment of a court of competent jurisdiction is not rendered a nullity merely because an error of law was made somewhere in the course of the proceeding. And by the denial of relief in these cases by the use of a writ of *habeas corpus* in the federal courts, where the scope of the writ is broader than in most states, the effect of these decisions of this Court has been to leave the petitioner in each case remediless, no collateral remedy being necessary to satisfy due process inasmuch as there had been no violation of any constitutional right. In the case of *Frank* v. *Mangum*, 237 U. S. 309, this Court stated (p. 326):

"Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. *Ex parte Parks*, 93 U. S. 18, 21; *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Royall*, 117 U. S. 241, 250; *In re Frederich, Pet'r*, 149 U. S. 70, 75; *Baker* v. *Grice*, 169 U. S. 284, 290; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Markuson* v. *Boucher*, 175 U. S. 184."

This doctrine was summarized as follows in the case of *In re Converse*, 137 U. S. 624, where, in denying a writ of *habeas corpus*, this Court remarked as follows (p. 631):

"It is not our province to inquire whether the conclusion reached and announced by the [State] Supreme Court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the state constitution and laws.

"The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law; for there is no pretence of an abridgement of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

To the same effect see:

Worcester County Co. v. *Riley*, 302 U. S. 292, 299;
Central Land Co. v. *Laidley*, 159 U. S. 103, 112;
Jones v. *Buffalo Creek Coal Co.*, 245 U. S. 328, 329.

The recent case of *Sunal* v. *Large*, 332 U. S. 174, furnishes further recognition of the fact that a person may be without any remedy to correct a concededly erroneous rul-

ing made by a trial court, even where there would have been no conviction had the error not been made. In the *Sunal* case the trial court had erroneously refused to permit the defendants to attack a classification which had been made by the Selective Service Board, the court holding that the Board's classification was not subject to judicial review. The defendants did not appeal, but subsequently, in reviewing another case, this Court held that such classifications were reviewable. Nevertheless, the defendants' writs of *habeas corpus* were dismissed by this Court on the ground that *habeas corpus* may not be used to correct "errors in trial procedure which do not cross the jurisdictional line" (p. 179). Continuing, this Court pointed out (p. 182):

> "Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court. • • • Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process."

See also:

Johnson v. *Zerbst*, 304 U. S. 458, 465.

Erroneous rulings by a trial court on questions of law may be corrected by resort to the particular modes of direct review procedure which are provided for by law. If a person does not avail himself of those opportunities, he should not be heard to complain at some later date.

POINT II

The Erie County Court's acceptance of petitioner's plea of guilty to the crime of attempted larceny, under an indictment charging him with criminally receiving stolen property, did not deprive petitioner of due process of law.

A. The Erie County Court had jurisdiction over petitioner's person and over the offense with which he was charged.

Petitioner does not question the fact that the indictment returned against him by the Grand Jury of Erie County on October 30, 1936, accusing him of the crime of criminally receiving stolen property, was valid in every respect. Petitioner also admits that he was duly arraigned under that indictment and was represented by competent counsel. There can be no doubt that at this point the Erie County Court had properly acquired jurisdiction over the person of petitioner. That Court also had jurisdiction over the crime with which petitioner was charged (as well as the crime to which he subsequently pleaded guilty), for Section 39, subdivision 2, of the New York Code of Criminal Procedure vests the Erie County Court with jurisdiction to try and determine indictments for all crimes.

In the course of this valid pending judicial proceeding the Court was called upon to decide the question of law whether the commission of the crime of attempted grand larceny, second degree, was "necessarily included" in the crime with which petitioner was charged in the indictment, thereby permitting a conviction for the lesser offense, as provided for by Section 445 of the New York Code of Criminal Procedure. If, in deciding that question of law, the court reached an erroneous conclusion, that error did not affect

the jurisdiction previously acquired. Petitioner could have had such ruling reviewed and corrected by the State appellate courts, had he so desired. It is another matter entirely for him to claim that this particular error, which did not affect his constitutional rights, vitiated the entire proceeding.*

B. The indictment under which petitioner's plea of guilty was accepted, and the court's acceptance of such plea, complied with the requirements of the due process clause.

The indictment accusing petitioner of criminally receiving stolen property vested the court with jurisdiction to accept a plea of guilty to attempted grand larceny, notwithstanding the fact that by doing so the court may have committed an error. The case of *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, referred to *supra*, pages 5, 7, involved a set of facts almost identical with those of the present case. In handing down the opinion of the New York Court of Appeals in that case, the late Chief Judge Lehman drew an analogy between the infirmity inherent in a judgment based upon a verdict or plea where, as here, the indictment fails to state facts sufficient to constitute the *particular* crime of which the defendant has been found guilty, and the infirmity inherent in a judgment based upon a verdict or plea where the indictment fails to state facts sufficient to constitute *any* crime. He pointed out that in both cases there is a valid accusation pending against the defendant, charging him with the commission of a crime; in both cases the court has jurisdiction of the person of the defendant

* That the determination of this question of law was not free from all doubt is indicated by the fact that Section 1308 of the New York Penal Law, designating receiving stolen property as a crime, is contained in Article 122 of the Penal Law which deals with "Larceny."

and general jurisdiction of the crime; and likewise in both cases it is within the court's jurisdiction to determine whether or not the indictment sufficiently charges that crime.

There have been numerous cases before this Court where persons who had been duly convicted and incarcerated sought their release by writs of *habeas corpus* upon the contention that inasmuch as the indictments under which they had been convicted did not state facts sufficient to constitute any crime, the sentencing courts could not have acquired jurisdiction to sentence them for crimes not specifically set forth in the indictments. In every one of such cases this Court dismissed the writ of *habeas corpus* on the ground that the question of the sufficiency of an indictment to charge the crime for which there was a conviction, may not be reviewed by means of a collateral attack. The basic reason for the adoption of this rule is a sound one, for, as was enunciated by this Court in *Knewel* v. *Egan*, 268 U. S. 442, 446:

> "It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise every judgment of conviction would be subject to collateral attack and review on *habeas corpus* on the ground that no offense was charged or proved. It has been uniformly held by this Court that the sufficiency of an indictment cannot be reviewed in *habeas corpus* proceedings. *Ex parte Watkins*, 3 Peters 193; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Parks, supra; In re Coy, supra; Bergemann* v. *Backer, supra; Howard* v. *Fleming*, 191 U. S. 126 *Dimmick* v. *Tompkins*, 194 U. S. 540; *In re Eckart*, 166 U. S. 481; *Goto* v. *Lane*, 265 U. S. 393."

The case of *Goto* v. *Lane*, 265 U. S. 393, cited in the *Knewel* case, also dealt with a contention, raised by a writ of *habeas corpus*, that the indictment did not charge a crime. There, too, this Court stated (p. 402):

"The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency and the effect to be given to the stipulation were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not for that reason void, *Ex parte Watkins*, 3 Pet. 193, 203; *Ex parte Parks*, 93 U. S. 18, 20; *Ex parte Yarbrough*, 110 U. S. 651, 654, but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. *Markuson* v. *Boucher*, 175 U. S. 184. And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute. *Riddle* v. *Dyche*, 262 U. S. 333. And see *Craig* v. *Hecht*, 263 U. S. 255."

The decisions of this Court have been unambiguous and uniform, and in every instance it has been held that the question of the sufficiency of an indictment to set forth the crime of which the accused is convicted is a matter solely for the determination of the trial court, reviewable only by direct appeal, not by collateral proceedings. (*Dimmick* v. *Tompkins*, 194 U. S. 540, 551-2; *Howard* v. *Fleming*, 191 U. S. 126, 135; *In re Eckart*, 166 U. S. 481, 482-3; *Ex parte Yarbrough*, 110 U. S. 651, 653-4; *Ex parte Parks*, 93 U. S. 18, 20; *Ex parte Watkins*, 3 Pet. 193, 203, 206; *In re Coy*, 127 U. S. 731; *Bergemann* v. *Backer*, 157 U. S. 655.)

Although, as we have shown above, the indictment herein was in proper form and vested the trial court with competent jurisdiction, it should be borne in mind that an indictment by a grand jury is not essential for due process (*Hur-*

tado v. *California*, 110 U. S. 516; *Frank* v. *Mangum, supra*, 237 U. S. 309; *Dowdell* v. *United States*, 221 U. S. 325). Due process is satisfied when an accused has been notified of an accusation pending against him and has been given an adequate opportunity to defend himself (*Garland* v. *Washington*, 232 U. S. 642, 645; *Louisville & Nashville R. Co.* v. *Schmidt*, 177 U. S. 230, 236; *Frank* v. *Mangum, supra*).

In the case at bar, the indictment found against petitioner by the Erie County Grand Jury informed him that there was an accusation pending against him. He was given every opportunity to defend himself against that charge, and he had the assistance of competent counsel to aid him in his defense. Under these circumstances, petitioner requested that he be permitted, and he was permitted, to plead guilty to a lesser charge which he, the district attorney and the court all assumed to be within the purview of the indictment. Simply because that assumption may have been erroneous does not detract from the fact that petitioner, knowing the crime with which he was being charged, of his own volition admitted that he was guilty of the commission of that crime. If petitioner had denied his guilt, he would have been accorded a proper hearing under the law and an opportunity to show his innocence. By pleading guilty to attempted grand larceny, second degree, with the advice of counsel, petitioner admitted that he knew the precise nature of the charge against him and, being guilty thereof, he wished to forego his right to be tried under that accusation.

POINT III

Petitioner requested and received a favor from the Erie County Court by its acceptance of his plea of guilty to a reduced charge; petitioner should not now be permitted to attack this judgment rendered at his request.

At the time of petitioner's conviction in 1937 there were suitable remedies available to him whereby the alleged error of the Erie County Court could have been corrected. Inasmuch as petitioner did not avail himself of any of these methods for procuring relief, it does not seem unreasonable to assume that petitioner was entirely satisfied with the judgment rendered by the court and did not desire to have it set aside or to impeach it in any way. We contend that petitioner's request for, and acquiescence in, the erroneous ruling of the court constituted a waiver of such error so as to preclude him from now asserting that issue.

In the first place, following petitioner's conviction in the Erie County Court, he could have appealed as of right from the judgment of conviction, and the error complained of could then have been reviewed and corrected by the appellate courts. The New York Code of Criminal Procedure governs the practice in criminal cases in New York State (*People* v. *Gersewitz*, 294 N. Y. 163). In 1937, as at the present time, Sections 515-520 of the New York Code of Criminal Procedure expressly provided that a defendant could appeal "from the judgment on a conviction after indictment" (§ 517), and that every person "convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal" (§ 520). The statement to the contrary on page 6 of petitioner's brief is unfounded. The case of *Lyons* v. *Goldstein, supra*, cited by petitioner, con-

tains no discussion whatever regarding the right of appeal from a judgment of conviction entered on a plea of guilty. Nor is the case of *People* v. *Wright*, 263 N. Y. App. Div. 1020, also cited by petitioner, applicable, for the appeal there had been taken from an order denying a motion to reopen and set aside a judgment of conviction on the ground of newly discovered evidence; it had nothing to do with the question of a direct appeal from a judgment of conviction. Furthermore, the majority opinion of the New York Court of Appeals in the *Wachowicz* case (as distinguished from its dissenting opinion cited by petitioner) recognized the fact that the right of appeal is available even though the judgment of conviction is entered on a plea of guilty (293 N. Y. 361, at page 366). Petitioner never took any such appeal and, so far as the record shows, he never expressed any intention of doing so; his time to appeal has long since expired.

Petitioner could also have moved to withdraw his plea of guilty pursuant to Section 337 of the New York Code of Criminal Procedure, in effect in 1937, which provides that the court "may in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn and a plea of not guilty substituted." If this motion to withdraw were improperly denied and judgment entered, an appeal could have been taken from the judgment of conviction, and upon such appeal, the intermediate order denying the application to withdraw the plea of guilty could have been reviewed (N. Y. Code of Criminal Procedure § 517; *cf. Canizio* v. *New York*, 327 U. S. 82, 86; *People ex rel. Wachowicz* v. *Martin*, *supra*, 293 N. Y. 361, 366).

Another procedure which was open to petitioner was to move in arrest of judgment after his plea of guilty, on the ground that the facts stated in the indictment did not constitute a crime (N. Y. Code of Criminal Procedure § 467).

An improper denial of that motion likewise could have been reviewed on appeal (N. Y. Code of Criminal Procedure § 517; *People ex rel. Wachowicz* v. *Martin, supra*). A complete answer to petitioner's claim that this mode of review was not available to him is found in the opinion of the New York Court of Appeals in *People ex rel. Prince* v. *Brophy*, 273 N. Y. 90. There, too, the judgment of conviction had been entered upon relator's plea of guilty to the indictment, and six years thereafter he sought to have it set aside by *habeas corpus* on the ground that the indictment was insufficient to charge the crime to which he pleaded guilty. The Court dismissed the writ of *habeas corpus*, pointing out on page 96:

> "The defendant asked in the midst of his trial that the court accept from him a plea of larceny in the second degree instead of continuing his case for robbery in the first degree, a much more serious charge. The plea was accepted. *The defendant could have moved in arrest of judgment alleging the insufficiency of this indictment to cover the larceny in the second degree, but he did not do so.*" (Emphasis supplied.)

The case at bar is entirely different from the case of *Marino* v. *Ragen*, 332 U. S. 561, cited on page 7 of petitioner's brief. There the State of Illinois admitted that Marino had been deprived of his constitutional rights and the facts showed that Marino had not been able to procure relief because of the "Illinois procedural labyrinth." In the present case, the aforementioned New York State procedural remedies were clearly provided for by statute but petitioner never even attempted to make use of any of them. He never asked for a review of the ruling of law, and therefore, he never obtained any review; but that does not detract from the fact that suitable relief was made available to him.

Had petitioner availed himself of any one of the foregoing remedies, he could have had the alleged error of the trial court corrected. Apparently the reason why he did not do so was that he recognized that he was receiving clemency from the Erie County Court by being given only a one to two year suspended sentence on probation, as compared with a possible ten year sentence to be served in state prison and a $1,000 fine, if he were found guilty of the crime of criminally receiving stolen property for which he had been indicted. Having already received one favor from the court, petitioner should not be permitted to burn his candle at both ends by being allowed to repudiate that favor whenever it happens to suit his convenience.

This Court's opinion in the case of *Parker v. Illinois*, 333 U. S. , decided on April 5 of this year, appropriately illustrates the principle of waiver which is applicable here. Speaking for the Court in the *Parker* case, Mr. Justice Douglas stated:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara*, 266 U. S. 314; *Central Union Co.* v. *Edwardsville, supra.* The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U. S., pp. 194-195. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions, raised by petitioner in his attack on the amended order, could have been taken all the

way to this Court was not only clearly marked, it was also open and unobstructed."

Similarly in the case at bar, three clearly marked, unobstructed channels were provided to petitioner by New York State in 1937, whereby petitioner could have raised the issue he now relies upon. These three remedial channels, which were not blocked by any "hypertechnical procedural obstructions,"* gave petitioner "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the State courts. Analogously, when petitioner chose to abandon his privilege of having the ruling reviewed, he waived for all time his right to do so.

The same reasoning was applied by this Court in *Canizio v. New York, supra,* 327 U. S. 82, involving a claim by Canizio that he had been denied the benefit of counsel prior to his conviction, in deprivation of his constitutional rights. The records showed that although Canizio did not have counsel when he was arraigned, he was represented by counsel prior to and at the time of his sentence. Upon these facts it was held that Canizio actually had had the benefit of counsel and that when that counsel took over the defendant's case, he could then have raised the question of a defect in the earlier part of the proceedings. "Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel" (p. 87). Accordingly, petitioner's failure in the present case to raise the question of the alleged error at the time when the various State statutes afforded him that opportunity, should now preclude him from relying upon that alleged error as a basis for relief.

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* *Cf.* dissenting opinion of Mr. Justice Rutledge in *Parker v. Illinois, supra.*

Subsequently, in the case of *Gayes* v. *New York*, 332 U. S. 145, this Court referred with approval to the *Canizio* case, stating (p. 148):

> "We there held that whatever doubts may arise from the circumstances of a plea of guilty, if, before sentence is imposed, the opportunities required by the Constitution for meeting the legal implications of the plea are satisfied, the sentence must stand."

As discussed above, before sentence was imposed in the present case, petitioner had been afforded ample opportunity to resolve any doubts which might have arisen from the circumstances of his plea of guilty.

Another case in point involving waiver was *Yakus* v. *United States*, 321 U. S. 414, which dealt with a criminal prosecution in Federal district court for violation of a regulation promulgated pursuant to the Emergency Price Control Act of 1942. In this prosecution the defendant sought to raise the defense that the regulation was arbitrary and unreasonable, thereby depriving him of property without due process of law in violation of the Fifth Amendment to the United States Constitution. Although the Price Control Act specifically provided a procedure whereby the validity of any regulation could be determined by a proceeding in the Emergency Court of Appeals, the defendant had not availed himself of such method of review. This Court held that the defendant's failure to abide by the statutory procedure for review constituted a waiver of his right to raise that constitutional question, stating (pp. 444-5):

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil* v. *Vermont*, 144 U. S. 323, 331; *Barbour* v. *Georgia*, 249 U. S. 454, 460;

Whitney v. *California*, 274 U. S. 357, 360, 362, 380. • • • While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts."

Conclusion

In the proceedings in the Erie County Court in 1937, petitioner had been properly held to answer for the crime charged in the indictment. He sought and obtained the benefit that might accrue to him from a finding of guilt of a crime connected with the same transaction, though perhaps not necessarily included in the crime charged in the indictment. Of all the persons in the courtroom at the time of his plea, petitioner best knew whether or not he was guilty of the crime to which he pleaded, which crime grew out of the circumstances of the crime for which he was indicted. He chose to say that he was an actor in the crime which was the subject of the indictment, at least to the extent of having committed attempted grand larceny, second degree. The ruling of the Erie County Court on the question of law in no way infringed upon any right guaranteed to petitioner by the United States Constitution. Any error in that ruling could have been corrected by the use of various remedies which the State made available to petitioner but he decided not to take advantage of them. The Erie County Court had jurisdiction to determine whether in the particular circumstances surrounding the plea in this case it was authorized to render a judgment which it certainly was authorized to render in some circumstances. Its judgment, though possibly erroneous, was not a nullity, and petitioner, who asked the court to render that judgment in a valid pending judicial proceeding, should not now be permitted to repudiate that judgment ten years later when it suits his convenience.

The judgment of the New York Court of Appeals should be affirmed.

Dated: April 19, 1948.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany 1, New York

WENDELL P. BROWN
Solicitor General,
IRVING I. WAXMAN
EMIL L. COHEN
Assistant Attorneys General, of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 583.—October Term, 1947.

Joseph Paterno, Petitioner, v. John A. Lyons, as Commissioner of Correction of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 1, 1948.]

Mr. Justice Black delivered the opinion of the Court.

October 30, 1936, the petitioner was indicted in the County Court of Erie County, New York, on a charge of

> "Buying, receiving, concealing and withholding property, knowing the same to have been stolen or appropriated wrongfully in such manner as to constitute larceny, contrary to the Penal Law, Section 1308, in that he, the said Joseph Paterno on or about the 5th day of October, 1936, at the City of Tonawanda, in this County, feloniously brought, received, concealed and withheld property stolen from Charles M. Rosen, doing business under the assumed name and style of Arcade Jewelry Shop."

The punishments provided for this offense and for larceny are substantially the same. Both may, according to circumstances, range up to ten years at hard labor.[1] November 10, 1936, petitioner appeared in court with counsel, pleaded not guilty to the indictment, and was released on a bond of $2500. Five months later, on April 14, 1937, he again appeared in Erie County Court and upon agreement with the district attorney was "permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree." Under New York law the punishment for

[1] N. Y. Penal Law §§ 1294, 1297, 1308.

such an attempt can be no more than half the punishment provided for the offense attempted.[2] The sentence, not imposed until July 16, three months after the plea of guilty, was for fifteen months minimum and thirty months maximum at hard labor. This sentence was suspended and petitioner was placed on probation with a requirement that he "make restitution of $75.00 cash balance as determined by probation dept."

Although discharged from probation December 1, 1938, petitioner on December 27, 1945, made a motion in the nature of *coram nobis* in the Erie County Court asking that court to vacate and set aside its former conviction of petitioner, permit withdrawal of the plea of guilty, and for leave to plead *de novo*. There was a special reason why petitioner wished to vacate this judgment long after the probationary restraints of the sentence had been lifted. In the meantime he had pleaded guilty in the Chautauqua County Court, New York, to the crime of robbery second degree under an indictment charging him with robbery first degree. In accordance with the requirements of the New York second felony offender law[3] the Chautauqua County judge had sentenced petitioner to 15 to 30 years at hard labor, proof having been made before him of petitioner's prior Erie County conviction for attempted grand larceny second degree.

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[2] N. Y. Penal Law § 261. Maximum punishment for grand larceny, second degree is 5 years. N. Y. Penal Law § 297. The District Attorney explained his reasons for the agreement in these words: "Only a very small portion of the stolen property was recovered and that was found in the possession of several admitted inmates of a disorderly house who are of necessity the chief witnesses for the People in this case. For these reasons and because of the character of these witnesses, it is recommended that the defendant be permitted to plead guilty to the reduced charge of Attempted Grand Larceny 2nd Degree."

[3] N. Y. Penal Law § 1941.

The grounds of the motion in the nature of *coram nobis* were that the Erie County Court had exceeded its power in accepting his plea of guilty to the offense of attempted grand larceny second degree under the indictment which charged him with the offense of receiving, concealing, and withholding property knowing it to have been stolen. He alleged that judgment of conviction in a case initiated by an indictment which did not include the charge to which he had pleaded guilty denied him his right under Art. 1, § 6 of the New York Constitution to be prosecuted for an infamous crime only by indictment of a grand jury,[4] and also denied him due process of law guaranteed by the Fourteenth Amendment.[5] The judge of the Erie County Court was of opinion that acceptance of the plea of guilty to the lesser offense deprived him of rights guaranteed by the New York Constitution and that therefore his conviction was without due process of law. 187 Misc. 56, 60 N. Y. S. 2d 813. That judge was prevented from vacating the judgment, however, by a writ of prohibition issued upon the application

[4] "No person shall be held to answer for a capital or other infamous crime unless on indictment of a grand jury. . . ." N. Y. Const., Art. 1, § 6.

[5] These questions had previously been raised by petitioner in other New York courts without success. In 1943 he had moved the Chautauqua County Court to vacate its judgment, under which he had been sentenced as a second felony offender. That Court held it was without power to pass upon the validity of the Erie County judgment and dismissed his motion. *People* v. *Paterno*, 182 Misc. 491, 50 N. Y. S. 2d 713. In another proceeding the Appellate Division of the New York Supreme Court, relying on *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, held that habeas corpus was not available to obtain vacation of the judgment, and that the only way to raise a question as to whether a plea of guilty to attempted larceny could be accepted under an indictment such as that against Paterno was by appeal or motion in arrest of judgment. *People ex rel. Paterno* v. *Martin*, 268 App. Div. 956, 51 N. Y. S. 2d 679.

of the State by the Supreme Court of Erie County. That court held that Paterno had "been denied no constitutional or legal right." The Fourth Department of the Supreme Court, Appellate Division, affirmed, 272 App. Div. 120, 69 N. Y. S. 2d 715. Stating that acceptance of Paterno's plea to the lesser offense might have been an error of law which would have justified relief by motion in arrest of judgment or by appeal as of right; but that petitioner, having declined to avail himself of these remedies within the statutory period, could not later raise the question.* It failed to accept Paterno's claim that the circumstances under which his plea was entered deprived him of due process of law. The New York Court of Appeals affirmed without opinion. 297 N. Y. 617, 75 N. E. 2d 630. We granted certiorari. 333 U. S. —.

It is again contended here that acceptance of petitioner's plea of guilty to attempted grand larceny second degree under an indictment which charged that he had bought, received, concealed, and withheld stolen property deprived him of his right under the New York Constitution to be prosecuted for an infamous crime only by a grand jury indictment and that consequently the Erie County judgment of conviction is a nullity. But this contention as to New York law has previously been rejected by the State's highest court, in *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, and was again rejected by the New York courts in this case. Their decision on such a state question is final here. *In re Duncan*, 139 U. S. 449, 462; *West* v. *Louisiana*, 194 U. S. 258, 261.

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* The State argues here that while petitioner had a right to appeal and challenge acceptance of the plea of guilty under the circumstances shown, neither *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53, nor any other New York Court of Appeals case has squarely held that the trial court's action would have constituted reversible error.

Petitioner next argues that the State has failed to supply him an available remedy to attack the judgment against him and that such a failure denies him due process of law guaranteed by the Fourteenth Amendment. See *Mooney* v. *Holahan*, 294 U. S. 103, 113. But this contention falls with its premise. Petitioner, within the periods prescribed by New York statutes, could have challenged any alleged errors of state law either by filing a motion to withdraw his plea of guilty, or a motion in arrest of judgment, or by taking a direct appeal from the original judgment.[1] Certainly in the absence of any showing that petitioner was without an opportunity effectively to take advantage of these corrective remedies to challenge purely state questions such remedies are adequate from a due process standpoint. See *Parker* v. *Illinois*, 333 U. S. 571; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 169, and cases cited n. 6.

Petitioner further challenges the judgment as a denial of due process upon the ground that the indictment charged him with one offense and that the judgment was based on a plea of guilty to an entirely separate offense. This challenge again basically rests on the allegation that under New York law an indictment for receiving stolen property does not necessarily include a charge of an attempt to steal the property. Petitioner's motion to vacate on such a federal constitutional ground appears to be an

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[1] N. Y. Code Crim. Proc. §§ 337, 467, 469, 517, 519–521; N. Y. Laws 1946, c. 942; N. Y. Laws 1947, c. 706; *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 68 N. E. 2d 849; *Matter of Hogan* v. *N. Y. Supreme Court*, 295 N. Y. 92, 65 N. E. 2d 181; *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361, 57 N. E. 2d 53; *People* v. *Gersewitz*, 294 N. Y. 163, 61 N. E. 2d 47; *Matter of Morhous* v. *N. Y. Supreme Court*, 293 N. Y. 131, 56 N. E. 2d 79; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19, 47 N. E. 2d 425; see *Canizio* v. *New York*, 327 U. S. 82, 84–85.

available procedure under New York law,[8] and the courts below so assumed. Determination of this federal due process question does not depend upon whether as a matter of New York law the Erie County judge erred in permitting petitioner to plead guilty.[9] The question turns rather upon whether the petitioner under the circumstances here disclosed was given reasonable notice and information of the specific charge against him and a fair hearing in open court. *In re Oliver*, 333 U. S. 257, 273, 278; *Cole* v. *Arkansas*, 333 U. S. 196, 201. We agree with the New York courts that this petitioner had such notice and information. The fairness of the hearing afforded petitioner is not challenged.

There is close kinship between the offense of larceny and that of receiving stolen property knowing that it was stolen. When related to the same stolen goods, as here, the two crimes certainly may fairly be said to be "connected with the same transaction" as the New York Court of Appeals noted in the *Wachowicz* case. 293 N. Y. at 367, 57 N. E. 2d at 56. A person commits larceny under New York law if he "unlawfully obtains or appropriates" an article, N. Y. Penal Law § 1294; he violates the receiving of stolen property statute if he "in any way . . . conceals, withholds, or aids in concealing or withholding . . . property, knowing the same to have been stolen or appropriated in such manner as to constitute larceny," N. Y. Penal Law § 1308. The overlapping nature of the two offenses is further emphasized by the definition of larceny in § 1290, which includes conduct whereby any person who "with intent to deprive or defraud another of the use and benefit of his property, or to appropriate the same to the use of any person other than the true owner,

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[8] See cases cited note 7; Fuld, The Writ of Error Coram Nobis, 117 N. Y. L. J. 2212, 2230, 2248.

[9] See *Caldwell* v. *Texas*, 137 U. S. 692, 698; *In re Converse*, 137 U. S. 624, 631; *Leeper* v. *Texas*, 139 U. S. 462, 468; *Davis* v. *Texas*, 139 U. S. 651; *Howard* v. *Kentucky*, 200 U. S. 164, 173.

wrongfully takes, obtains or withholds [any property] by any means whatever, from the possession of the true owner or of any other person. . . ."

It would be exaltation of technical precision to an unwarranted degree to say that the indictment here did not inform petitioner that he was charged with substantial elements of the crime of larceny thereby enabling him, as a means of cutting his sentence in half, to agree to plead guilty of an attempted larceny. Procedural requirements are essential constitutional safeguards in our system of criminal law. These safeguards should constantly and vigilantly be observed to afford those accused of crime every fair opportunity to defend themselves. This petitioner had such opportunity. Months after his first appearance in court he came back and pleaded guilty to an attempt wrongfully to "withhold" the very property of another which the indictment had originally charged him with wrongfully "withholding."[10] It would be a strained interpretation of petitioner's constitutional rights to hold that under these circumstances he was not given sufficient notice of the charge against him to afford a basis for an intelligent decision to plead guilty to a related but lesser offense than that specifically described in the indictment. The due process clause of the Federal Constitution requires no such holding.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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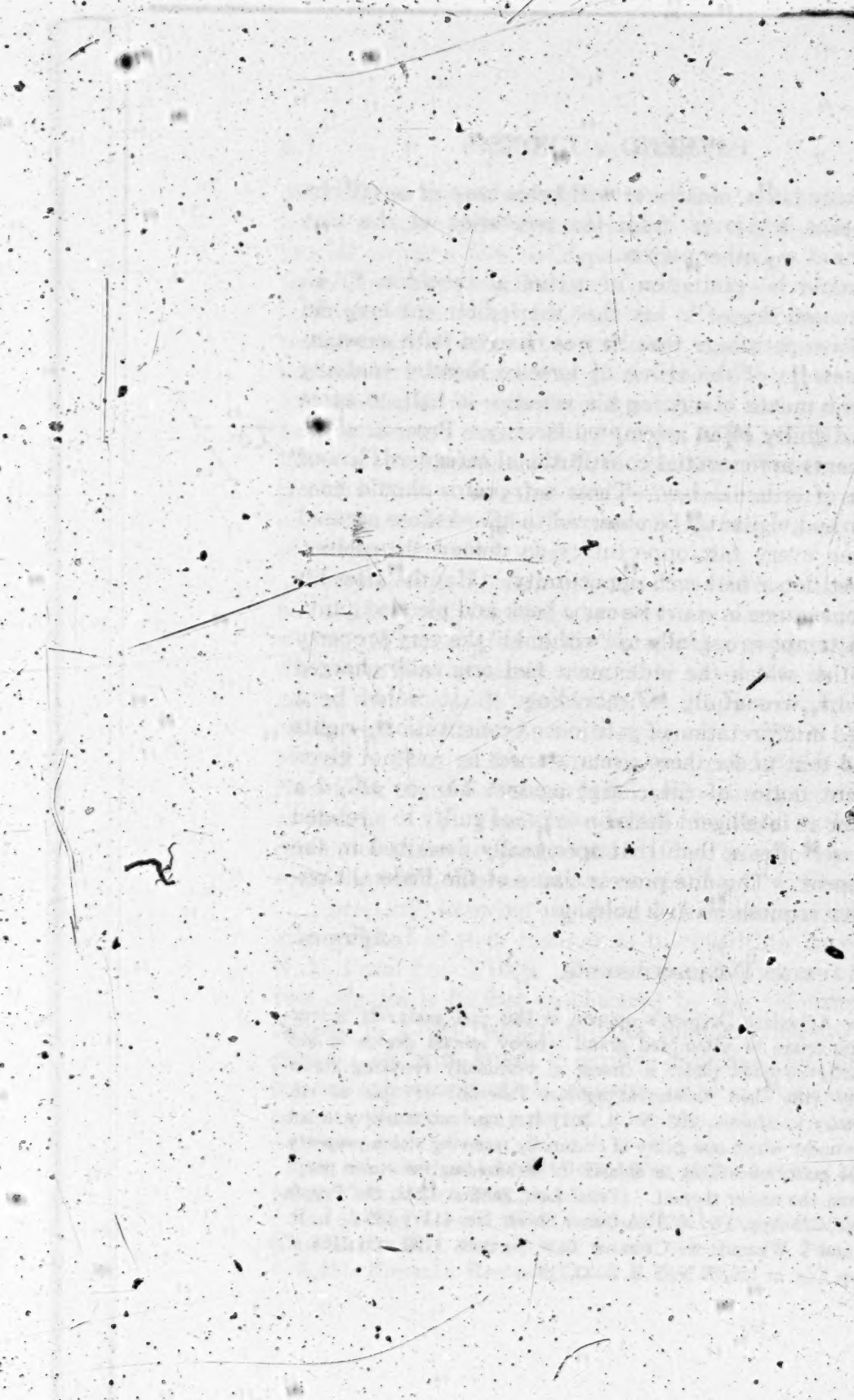
[10] The Appellate Division's opinion in this case said: "It is true that the crime of attempted grand larceny second degree is not necessarily included under a charge of criminally receiving stolen property (the then indictment against Paterno) (*People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361) but one can conceive a set of facts under which one guilty of criminally receiving stolen property could be guilty of larceny in unlawfully withholding the stolen property from the owner thereof. (Penal Law, Section 1290; See *People* v. *Vitolo*, 271 App. Div. 959 (Advance Sheets No. 411); 136 A. L. R. 1091; and 2 Wharton on Criminal Law, Sections 1122 and 1168.)" 272 App. Div. at 126, 69 N. Y. S. 2d at 719.



SUPREME COURT OF THE UNITED STATES

No. 583.—October Term, 1947.

Joseph Paterno, Petitioner, v. John A. Lyons, as Commissioner of Correction of the State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.

[June 1, 1948.]

Mr. Justice Frankfurter, concurring.

The New York Constitution requires that prosecution for an "infamous crime" be upon indictment by grand jury. The New York Court of Appeals has held that this constitutional requirement does not nullify the acceptance by a trial court of a plea of guilty to the offense of attempted grand larceny, second degree, upon an indictment for knowingly receiving stolen goods. Since, so far as the United States Constitution is concerned, the States may dispense with accusations by grand juries, it is for New York and not for us to decide when the procedural requirements of New York law, not touching those fundamental safeguards which the United States Constitution protects, are satisfied. What is here challenged is New York's determination that the knowing receipt of stolen goods is sufficiently related to larceny so as to permit acceptance of a plea of guilty of the latter on the assumption that an indictment for one affords adequate notice of the other. Surely this does not rise to the dignity of a substantial federal question. In the early days of the Fourteenth Amendment, this Court deemed it appropriate to remind that that Amendment had not made this Court

an appellate tribunal to supervise the administration of the criminal law of the States. It is not irrelevant to recall this admonition

Thus, I agree with the Court's opinion, but draw from it the conclusion that the writ of certiorari should be dismissed for want of a substantial federal question.